92-208

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

NASAR SIMAAN,
Petitioner,

vs.

TEXACO REFINING and MARKETING INC.,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

PETER M. GWOSDOF
Law Offices of
Peter M. Gwosdof
451 West Lincoln Avenue
Suite 251
Anaheim, California 92805
Telephone (714) 956-3911
Attorney for Petitioner
Member of the Bar
State of California
Supreme Court
of the United States,
Counsel for Petitioner

Bowne of Los Angeles, Law Printers (213) 627-2200

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ISSUES PRESENTED

1. Do State courts have concurrent jurisdiction over State Law causes of action brought originally in the California Superior Court under the California Business and Professions Code §20999 et seq. relating to the operation of a petroleum franchise for failure of Respondent, Texaco, to timely provide motor fuels while Petitioner was a lessee of the premises subleased to him by Texaco and Texaco withholding consent to the sale and assignment of Petitioner's franchise?

2. May the United States District Court remove a franchisee from his leased sales premises under The Federal Petroleum Marketing Practices Act, 15 USC §2801 et seq. (the "PMPA") where such action was previously denied by the Orange County California Superior Court under concurrent jurisdiction of California State Law, California Civil Code §§1159 et seq. and the PMPA?

3. Do Federal District Courts have exclusive jurisdiction under the doctrine of Federal preemption pursuant to the "PMPA", Federal Petroleum Marketing Practices Act, 15 U.S.C. §2801, et seq. where the claims of a franchisee against a refiner or distributor of motor fuels involve issues other than matters incident to termination or renewal of a petroleum franchise?

4. Is the lease document of the premises used for the sale of petroleum products an inseverable, integral and necessary part of the agreement between the franchisee and refiner constituting the petroleum sales "franchise" under the PMPA?

PARTIES

Defendant/Respondent, Texaco Refining and Marketing, Inc., is a wholly owned subsidiary of T.R.M.I., Inc., a subsidiary of TEXACO, INC. and Petitioner, is an individual, NASAR SIMAAN as set forth in the caption of the case in the United States Supreme Court. All parties appear in the caption of this Petition.

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OPINIONS OF THE LOWER COURTS

The unpublished Court Judgments of the United States District Court for the Central District of California, the Honorable Terry Hatter, United States District Judge dated March 25, 1988 and July 25, 1988 are set forth in Appendix A.

The Unpublished Memorandum Decision of United States Court of Appeals, Ninth Circuit filed March 20, 1992, Rehearing denied by written Order filed dated May 11, 1992. The Unpublished Memorandum Decision of the United States Court of Appeals is set forth in Appendix B and the Order denying a Rehearing in Appendix C.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Title 15 of Sections 2805, 2806 of the United States Code. The Judgment of the United States District Court dated July 25, 1988 and filed July 25,1988 is sought to be reviewed as well as the Memorandum Decision of the United States Court of Appeals for the Ninth Circuit filed March 20, 1992.

PREVIOUS APPELLATE PROCEEDINGS

Petitioner's Petition For Rehearing was denied by the United States Court of Appeals for the Ninth Circuit by Order filed on May 11, 1992 (Appendix C).

STATUTORY PROVISION CONFERRING JURISDICTION UPON THE SUPREME COURT OF THE UNITED STATES

Federal Petroleum Marketing Practices Act 15 U.S.C.§2801, et seq. "P.M.P.A.". The pertinent sections are set forth in Appendix D.

STATEMENT OF THE CASE

At the time of the events herein described, Petitioner was a Texaco Franchisee selling Texaco branded petroleum products from certain premises that had been leased to him by Texaco as part of his Texaco franchise (the leased marketing premises). While the franchise was in full force and effect, Texaco sought to terminate the franchise because of certain alleged breaches by Petitioner of the franchise, which were denied and challenged by Petitioner.

When Petitioner refused to accept Texaco's attempt to terminate his franchise and vacate the leased marketing premises, Texaco filed an unlawful detainer action in the Orange County California Superior Court. The venue for that action was chosen by Texaco. Petitioner successfully opposed a Motion for Summary Judgment brought by Texaco in the state Court with findings that numerous issues were properly raised which should be tried by a judge or jury.

Thereafter, Petitioner filed the Complaint in this action seeking compensatory and punitive damages against Texaco for its alleged wrongful conduct arising out of a petroleum franchise relationship between Plaintiff and Texaco under the PMPA. Such claims could not be raised under state law by way of cross complaint in the aforesaid California State Court unlawful detainer action instituted by Texaco. Pursuant to the verified Petition of Texaco, Petitioner's action was removed to the United States District Court for the Central District of California. However, Texaco's unlawful detainer action remained pending in the Orange County Superior Court. In obtaining said removal, Texaco contended that Petitioner's central claim arose from the termination of a petroleum marketing franchise. Thus, said action is governed by the PMPA, and therefore, the United States District Courts had original and exclusive

jurisdiction over said actions under the PMPA, Rustom v. Atlantic Richfield Co. (D.C. Cal. 1985) 618 F.Supp. 210.

In issue here is Petitioner's First Amended Complaint as removed to the U.S. District Court. It is plead in four (4) causes of action. The First Cause of Action is for damages for Texaco's wrongful termination of a petroleum franchise agreement, and was brought pursuant to the provisions of the PMPA. The Second Cause of Action is for damages for Texaco's failure to deliver gasoline, and was brought pursuant to certain provisions of California law dealing with the regulation of petroleum franchises which is embodied in the California Business and Professions Code §§20999, et seq. The Third Cause of Action is for damages for Texaco's withholding consent to a sale and assignment of a franchise agreement, and was brought on the theory of Texaco's breach of the implied covenant of good faith and fair dealing. The Fourth Cause of Action was for Intentional Interference With An Advantageous Business Relation.

Also in issue was a counterclaim filed by Texaco. It is plead in two (2) causes of action. The First Cause of Action is for Declaratory Relief with respect to the respective rights of Petitioner and Texaco regarding their petroleum franchise relationship and Texaco's attempt to terminate and cancel said franchise. The Second Cause of Action is for Unlawful Detainer whereby Texaco seeks possession of the Leased Marketing Premises. The basis of said Cause of Action is Texaco's contention that it validly terminated and canceled Petitioner's petroleum franchise, and it is therefore entitled to possession of The Leased Marketing Premises. It is the exact same cause of action that was still pending in Texaco's unlawful detainer action in The Orange County California Superior Court Where that Court has previously denied Texaco's Motion for Summary Judgment. The United States District Court granted a Summary Judgment brought

in favor of Texaco upon the Petitioner's Second and Third Causes of Action.

STATEMENT OF THE FACTS

Texaco was and now is engaged in the business of the refining and the distribution of petroleum products, including motor fuel under the brand-name "Texaco". Pursuant to a written lease dated December 31, 1979 (the "Old Lease"), Texaco leased to Petitioner, in connection with the sale to him of Texaco-brand petroleum products, including gasoline, a certain gas station referred to hereinafter referred to as the "Leased Marketing Premises".

Texaco knew at least as early as December 1981 that Petitioner was operating a U-Haul vehicle rental business from the Leased Marketing Premises as part of his business operation. Petitioner continued to conduct his U-Haul Business from the Leased Marketing Premises, disregarding the limitations of the number of vehicles that he could have on the said Premises as set forth in a letter sent to him by Texaco Marketing and Refining, Inc.

Notwithstanding Texaco's knowledge of Petitioner's continuing operation of a U-Haul Business from the Leased Marketing Premises, on or about November 17, 1982, Texaco and Petitioner entered into another lease (the "New Lease") for the Leased Marketing Premises for a term commencing May 1, 1983, and ending April 30, 1986.

In conjunction with the New Lease, Petitioner and Texaco also entered into an "Agreement of Sale" wherein Texaco agreed to continue to sell and deliver to Petitioner Texaco-brand products, including gasoline, for sale by Petitioner at the Leased Marketing Premises. Said Agreement of Sale was for a term commencing May 1, 1983 and ending April 30, 1986, which term was co-extensive with the

New Lease. With regard to this transaction it must be emphasized that Texaco knew that for many years Petitioner had been conducting a U-Haul Business from the Leased Marketing Premises in conjunction with his operating the gasoline service station business from said Premises. Texaco had objected to this business operation by Petitioner.

Shortly after entering into the New Lease and the November 1982 Agreement of Sale, on March 22, 1983, Texaco's Assistant Division Marketing Manager, G.S. Radici, sent to Petitioner another letter stating that Texaco was objecting to him operating a U-Haul Business from the Leased Marketing Premises. Thereafter, on December 19, 1983, Texaco sent to Petitioner yet another letter again objecting to his continuing to operate a U-Haul Business from the Leased Marketing Premises, and demanding that he wind up the operation of his U-Haul Business by January 20, 1984.

When Petitioner failed to abide by the demands set forth in Texaco's aforesaid letter of December 19, 1983, on March 12, 1984, Texaco's Division Marketing Manager, S.R. Shaw, sent Petitioner a letter notifying him that his Lease dated November 2, 1982 for the Leased Marketing Premises would be terminated effective June 12, 1984, pursuant to the provisions of the Petroleum Marketing Practices Act, 15 U.S.C. §§2801-2806. (Appendix D) On March 21, 1984, Petitioner's attorney, Peter M. Gwosdof, responded to the Texaco Marketing and Refining, Inc. letter of March 12, 1984. Mr. Gwosdof stated that Texaco's attempt to terminate Petitioner's franchise was "unjustified" and that Petitioner had a qualified buyer for the Leased Marketing Premises and requested that Texaco Marketing and Refining, Inc. or its Legal Department advise him (Gwosdof) immediately of Texaco's position regarding Petitioner's sale of the Leased Marketing Premises to the prospective buyer.

By letter dated April 3, 1984, Texaco responded to the letter of March 21, 1984, stating in effect that Petitioner's franchise was terminated by reason of Texaco's letter of March 12, 1984, and that Texaco expected Petitioner to vacate the Leased Marketing Premises by June 12, 1984.

Despite its letter of March 12, 1984, that it was terminating his franchise as of June 12, 1984, Texaco Marketing and Refining, Inc. accepted rent from Petitioner for the Leased Marketing Premises for the months of June and July 1984. However, on July 24, 1984, Texaco sent another letter to Petitioner stating that although Petitioner paid and Texaco accepted rent for the Leased Marketing Premises for June and July 1984, it was treating his tenancy of the Leased Marketing Premises as a hold-over month-to-month tenancy, and that his tenancy of the Leased Marketing Premises would terminate on August 31, 1984 at 4:00 P.M., at which time he was to surrender possession of said Premises to a Texaco representative. Said letter also stated that his hold-over tenancy did not extend the terms of the aforesaid Agreement of Sale.

Although Texaco continued to accept rent from Petitioner for June and July 1984, it discontinued selling to him Texaco-brand gasoline after June 1984. As a result, in order to continue with the operation of his service station business from the Leased Marketing Premises, Petitioner was required to purchase Texaco petroleum products, including Texaco-brand gasoline, from sources other than Texaco at higher prices than he would have paid under his Agreement of Sale with Texaco.

When Petitioner did not vacate the Leased Marketing Premises as demanded by Texaco in its aforesaid letter of July 24, 1984, Texaco instituted an action for unlawful detainer against Petitioner in the Orange County Superior

Court of California.

Subsequently, Texaco brought a Motion for Summary Adjudication of Issues in the aforesaid State Court unlawful detainer action, which was heard by that Court on March 11, 1985. On May 28, 1985, the Court ruled, in pertinent part, that there were triable material issues of fact as to whether the Lease was validly terminated pursuant to the terms of the Petroleum Marketing Practices Act based upon the conflicting declarations of the reasonableness and material significance of any breach of the terms of the franchise between the Petitioner and Texaco.

Notwithstanding the denial of its Motion, Texaco never set said action for trial, nor dismissed the same. Rather, it just left it in limbo.

After the denial of Texaco's Motion for Summary Adjudication of Issues in its unlawful detainer action, on July 23, 1985, Petitioner instituted the within action in the Orange County Superior Court of California. As above noted, in issue is the "First Amended Complaint by Franchisee Against Franchisor for Damages for: Wrongful Termination of Petroleum Franchise Agreements; Failure to Deliver Gasoline; Withholding Consent to Sell an Assignment of Franchise Agreement; and Damages for Intentional Interference with Advantageous Business Relations."

After Petitioner's filing of the First Amended Complaint, Texaco caused the removal of that action from the Orange County Superior Court of California to the United States District Court below. After removing this action from the Orange County Superior Court of California to the U. S. District Court, Texaco answered the First Amended Complaint, and simultaneously asserted a counterclaim for Declaratory Relief (First Cause of Action), and for Unlawful Detainer (Second Cause of Action).

As affirmative defenses to the Unlawful Detainer

cause of action of Texaco's counterclaim, Petitioner alleged:

"17. The Second Cause of Action fails to state a cause of action for unlawful detainer because no timely notice of alleged breach of the Franchise Agreement was ever given to [Petitioner] within the time periods specified by 15 U.S.C. §2802(b)(1)(2)(A)(i)(ii).13.

18. There is already an action pending for unlawful detainer for the premises entitled Texaco, Inc., a Delaware corporation, Petitioner v. Nasar Simaan, Defendant bearing Orange County Superior Court Case No. 439 805, which was filed on September 26, 1984."

Thereafter, Texaco filed a Notice of Motions and Alternative Motions for Summary Judgment directed solely to the First Cause of Action of the First Amended Complaint. The bases for the Motions were that the District Court lacked derivative jurisdiction to hear the claim, or, in the alternative, that said claim is barred by limitations, 15 U.S.C. §2805(a). Petitioner opposed the Summary Judgment Motions on the limitations defense on the ground that the within action was timely instituted within the one (1) year limitation period prescribed by 15 U.S.C. §2805(a) because Texaco's July 24, 1984 letter did not purport to cancel Petitioner's franchise until August 31, 1984, and the within action was instituted on July 23, 1985. Petitioner further opposed the Summary Judgment Motions on the derivative jurisdiction defense on the ground that the Respondent Court had derivative jurisdiction since the state and the federal courts have concurrent jurisdiction over PMPA claims.

The Motions for Summary Judgment were heard by the District Court on March 14, 1988, resulting in an Order

dated March 25, 1988. This Order granted Texaco's Motion only with regard to the statute of limitations defense, and ordered that the trial would be limited only to the claims asserted in the Second, Third and Fourth Causes of Action of the First Amended Complaint.

Subsequently, Texaco filed another Motion for Summary Judgment. This Motion was directed to the Second and Third Causes of Action of the First Amended Complaint (Damages for Failure to Deliver Gasoline and Damages for Withholding Consent to Sale and Assignment of Franchise Agreement, respectively), and as to the Second Cause of Action of Texaco's Counterclaim (Unlawful Detainer). The bases for Texaco's Motion was that neither the Second nor the Third Causes of Action state a cause of action for damages under California law because they are preempted by the PMPA, and that as a matter of law, Texaco is entitled to a Writ of Possession restoring possession of the Leased Marketing Premises to it pursuant to the Second Cause of Action of its Counterclaim because Petitioner's tenancy of said premises was validly terminated by Texaco, and therefore Petitioner is guilty of unlawful detainer.

Petitioner opposed said Motion on the grounds that Texaco's letters of March 12, 1984 and July 24, 1984 were ineffective in canceling Petitioner's franchise with Texaco because they were manifestly untimely under the PMPA; neither the Second nor the Third Causes of Action for Damages are pre-empted by the PMPA; and that the untimeliness of Texaco's attempt to terminate Petitioner's franchise can be urged by Petitioner as a valid defense to Texaco's counterclaim cause of action for unlawful detainer in this action.

The Motion for Summary Judgment was heard by the District Court on June 20, 1988, resulting in a Judgment

dated July 25, 1988, granting Texaco's Motion in its entirety and ordering that the only remaining issue to be tried is the amount of damages for Petitioner's alleged unlawful detainer.

As a result of the foregoing Judgment, the matter proceeded to trial only on the issue of Texaco's damages for Petitioner's alleged unlawful detainer of the Leased Marketing Premises resulting in a Judgment in favor of Texaco for $68,322.14 plus costs of suit.

On September 13, 1990, Petitioner filed his Notice of Appeal from the Order of March 25, 1988 granting Summary Judgment on the First Cause of Action of the First Amended Complaint, from the Judgment of July 25, 1988 granting Summary Judgment on the Second and Third Causes of Action of the First Amended Complaint and as to Petitioner's liability for unlawful detainer under the Second Cause of Action of the Counterclaim, and from the Judgment entered on August 17, 1990 awarding Texaco damages for Petitioner's alleged unlawful detention of the Leased Marketing Premises.

A WRIT OF CERTIORARI SHOULD BE GRANTED FOR ONE OR MORE OF THE FOLLOWING REASONS

LEGAL AND FACTUAL DISCUSSIONS

A. Both the Appellate and Trial Courts below committed reversible error in finding and ordering that the first cause of action for Texaco's wrongful termination of franchise was barred by the one year limitation period prescribed by 15 U.S.C. §2805(a) Of The PMPA and that the U.S. District Court has exclusive

jurisdiction over an unlawful detainer action involving a petroleum franchise. Such a Decision distorts and tortures what Congress intended to be a meshing of Federal and State Law in a crucial and important sector of the economy of the United States. A lease of the sales premises is an integral part of the franchise.

Texaco contended and the Court below held that the First Cause of Action of the First Amended Complaint for damages for Texaco's wrongful termination of Petitioner's petroleum franchise was barred by the one (1) year statute of limitations embodied in 15 U.S.C. §2805(a).

The Court's aforesaid ruling was based upon a finding that Petitioner's franchise was terminated as of June 12, 1984 by reason of Texaco's March 12, 1984 letter to Petitioner.

That ruling by the Court below is erroneous and the Writ prayed for herein should be granted for the following reasons:

a. The statute of limitations with respect to PMPA claims is found in §2805(a) entitled "Enforcement Provisions", which, in pertinent part, provides as follows:

"[N]o such action may be maintained unless commenced within 1 year after the later of --
(1) the date of termination of the franchise or non-renewal of the franchise relationship; or
(2) the date the franchise fails to comply with the requirements of section 2802 or 2803 of this title."

b. As used in the PMPA, the term "franchise" means *any* (emphasis added) contract --- . . .
"(ii) between a refiner and retailer, ...
(iii) between a distributor and a retailer." (15

U.S.C. §2801 subd.1(A).)

c. As used in the PMPA "[t]he term 'franchise' includes --

> "(i) *any* (emphasis added) contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy; . . .". (15 U.S.C. §2801 subd. 1(B).)

d. As used in the PMPA, the term "termination" includes cancellation. (15 U.S.C. §2801 subd. 1(b)(17).)

Applying these definitions to the facts in this case, it was clear that the one (1) year period specified by §2805 subd. (a) began to run on August 31, 1984. Pursuant to Texaco's letter of July 24, 1984 to Petitioner, the franchise between Texaco and Petitioner was not purportedly canceled and terminated until August 31, 1984, the date that Texaco specified that Petitioner was to surrender possession of the Leased Marketing Premises to its representative. Further, although after June 12, 1984, Texaco considered Petitioner to be on a month-to-month tenancy, the franchise was not terminated as of June 12, 1984. Paragraph 8 of the Lease

Agreement for the Leased Marketing Premises specifically provides that *"if a month to month tenancy is created, it shall otherwise be subject to all of the other terms and conditions of this lease."* Therefore, if Petitioner's franchise was terminated, the termination date was August 31, 1984, *and not June 12, 1984*. Since Petitioner instituted the within action in the state court one (1) year from August 31, 1984, the action was timely instituted pursuant to the provisions of 15 U.S.C. §2806(a). (Midwest Petroleum Co. v. American Petrofina, Inc. (1985) 603 F.Supp. 1099, 1110.)

Service station franchises throughout the several states have the right to rely upon the laws of the states in which their business is domiciled where the state law does not conflict with but rather is the same as the applicable provisions of the PMPA, 15 USC §2806(a).

Such franchisees such as your Petitioner is denied due process of law by being unable to prosecute state court causes of action and being denied access to the state courts under a doctrine of Federal preemption.

In the California Court, Petitioner's unlawful detainer action in the forum originally chosen by Texaco was to have proceeded to a trial under state law, California Code of Civil Procedure §1159.

B. The PMPA does not pre-empt California law in claims for failing to deliver gasoline under a petroleum marketing franchise. Both the District and Appellate Court Below Committed Error In Ruling And Ordering That The Second Cause Of Action For Damages For Texaco's Failure To Deliver Gasoline Under California Law Is Pre-Empted By The PMPA. Such a holding, if left to stand, denies citizens of the several states the rights granted

to them under the law of their domicile which law is not preempted under the express terms of the PMPA 15 USC §2801 et seq.

Texaco contended and the Court below held that the Second Cause of Action of the First Amended Complaint for damages for Texaco's failure to deliver gasoline under California law is pre-empted by the PMPA.

Because the Second Cause of Action as set forth in Petitioner's First Amended Complaint involves an interaction between California law and the PMPA, a brief comparison and analysis of the two (2) bodies of law is proper and necessary at this point. The following comparison and analysis is offered to this Court to support Petitioner's request for the instant Writ of Certiorari:

a. The PMPA was enacted to protect franchised retailers of motor fuel from arbitrary or unfair terminations of non-renewals of their franchises by the franchisor by regulating the circumstances under which a franchisor is permitted to terminate or not renew a franchise relationship. Biakenship v. Atlantic Richfield Co. (1979) 478 F.Supp. 1016, 1017; Halder v. Standard Oil Co. (1981) 642 F.2d 107, 109-110; Lasko v. Consumers Petroleum of Conn. Inc. (1981) 547 F.Supp. 211, 216.)

b. Further, the PMPA outlines the circumstances under which termination or non-renewal is permissible by the franchisor (15 U.S.C. §2802), and the procedures a franchisor must follow with respect to termination or non-renewal. (15 U.S.C. § 2804). The PMPA also specifies the remedies available to a franchisee for the franchisor's wrongful termination or wrongful non-renewal of the franchise relation-

ship (15 U.S.C. §2805), the relationship between the PMPA and any state law or regulation respecting termination and non-renewal of the franchise relationship (15 U.S.C. §2805 subd. (a)), and the applicability of the PMPA to state law with respect to the transfer or assignment of franchises (15 U.S.C. §2805 subd. (b)).

c. California law which regulates various aspects of the relationship between petroleum product franchisors and franchisees is contained in the Business and Professions Code commencing with Chapter 7.5, §§20999, et seq. (the "Act"). The particular sections of the Act applicable to the Second Cause of Action are §§ 21140-21140.4, which deal with the remedies available to a franchisee for the franchisor's refusal to supply the franchisee with gasoline.

d. The foregoing demonstrates that:

(i) The PMPA applicable to this action regulates the petroleum franchise relationship only in the specifically designated areas of *termination* and non-renewal. Gager v. Mobil Oil Corp. (1982) 547 F.Supp. 854, 855 (fn.1); Lasko v. Consumers Petroleum of Conn, Inc., supra, at P. 217).

(ii) Thus, it is only in the areas of **termination** and **non-renewal** that the federal Act controls any state law that "is not the same as" the PMPA. (15 U.S.C. §2806 subd. (a); Di Napoli v. Exxon Corp. (1982) 549 F.Supp. 449, 455; Ted's Tire Service Inc v. Chevron U.S.A. Inc. (1979) 470 F.Supp. 163, 165.)

(iii) However, state law remains applicable in the areas of termination and non-renewal so long as it is the same as the federal Act. Veracka v. Shell Oil Co. (1981) 655 F.2d 445, 450; Ted's Tire Service Inc v. Chevron U.S.A. Inc., supra, at Page 165; California Arco Distributors, Inc. v. Atlantic Richfield (1984) 158 Cal.App.3d 349, 357 [204 Cal.Rptr. 743].)

(iv) On the other hand, the Act, in addition to regulating the area of termination of petroleum franchises (Business and Professions Code §§20999-20999.3), also regulates petroleum franchises with respect to the franchisor's obligation to supply the franchisee with gasoline (Business and Professions Code §20141.1), and the remedies available to a franchisee for the franchisor's breach of this obligation (Business and Professions Code §20141.4).

In light of the foregoing comparison and analysis of the PMPA as it relates to California law, the Court of Appeals below committed reversible error in finding and holding that the PMPA pre-empts California law with respect to Petitioner's claim for damages for Texaco's failure to deliver gasoline to him on and after June 12, 1984. The fact is that states are free to regulate petroleum franchises in areas not covered by the PMPA. Here, the gravamen of the Second Cause of Action is for wrongful refusal to sell and deliver gasoline, which is separate and distinct from the issue of termination of the franchise. Therefore, contrary to the finding and ruling of the District Court, upheld by the Court of Appeals, the Second Cause of Action is not and can not be pre-empted by the PMPA.

Thus, the District Court committed reversible error in finding and ordering that the Second Cause of Action for

damages for Texaco's failure to deliver gasoline under California law is preempted by the PMPA.

> C. The Court Below Committed Reversible Error In Finding And Ordering That The Third Cause Of Action For Texaco's Withholding Consent To The Sale And Assignment Of Franchise Agreement Was Pre-Empted By The PMPA. Sales of businesses intrastate must and should be governed by the laws of the State in which they are situated except where such sales have a direct bearing upon interstate commerce or in violation of the provisions of the PMPA, 15 USC §2806.

Texaco contended and the Courts below held that the Third Cause of Action of the First Amended Complaint for damages for withholding consent to the sale and assignment of the franchise agreement was pre-empted by the PMPA because the same occurred during the period of time that Petitioner's franchise was under notice of termination.

Texaco's contention and the finding and ruling of the Court below is predicated upon an implied finding that Texaco validly terminated Petitioner's franchise by its letters of March 12, 1984 and July 24, 1984, because of his continuing to operate a U-Haul Business from the Leased Marketing Premises.

However, and notwithstanding the foregoing, Texaco's letters of March 12, 1984 and July 24, 1984 upon which the aforesaid contention, finding and ruling are based, were ineffective in canceling Petitioner's franchise because they were manifestly untimely under all the time limitations

imposed by the PMPA. Thus under the Federal PMPA, assuming it were to apply, was incorrectly interpreted and applied by both the District Court and the Court of Appeals.

Under the PMPA, the grounds for termination of a petroleum franchise are set forth in 15 U.S.C. §2802(b)(2)(A-) through (E). Section 2802(b)(2)(A) through (C) sets forth specific time limitations which create a time frame in which a franchisor may assert grounds for seeking to terminate a franchise. More specifically, Section 2802(b)(A) through (C) states:

> "(2) For purposes of this subsection, the following are grounds for termination of a franchise . . . relationship:
> (A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure ---
>
> > (i) not more than 120 days prior to the date on which notification of termination . . . is given, if notification is given pursuant to section 2804(a) of this title; or
> >
> > (ii) not more than 60 days prior to the date on which notification of termination . . . is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.
>
> (B) A failure by the franchisee to exert good faith

efforts to carry out the provisions of the franchise, if ---

> (i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and
>
> (ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination . . . was given pursuant to section 2804 of this title.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise . . . is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence ---

> (i) not more than 120 days prior to the date on which notification of termination . . . is given, if notification is given pursuant to section 2804(a) of this title; or
>
> (ii) not more than 60 days prior to the date on which notification of termination . . . is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title."

The purpose of the specific time limitations imposed by the aforesaid provisions of Section 2802(b)(2) within which a franchisor must assert its rights to terminate a franchise is to preclude a franchisor from basing termination upon old events. California Arco Distributors Inc. v. Atlantic Richfield Co., supra, 158 Cal. App. 3d 349, 360.)

In every case under the PMPA there must be strict compliance with the time limitations imposed by the Act. (Hanes v. Mid-Atlantic Petroleum (U.S.D.C. - Mo. 1983) 577 Fed.Supp. 637, 646 and the cases cited therein, to wit: Escobar v. Mobil Oil Corp., 660 F.2d 398, 400 (2nd Cir. 1982); Thompson v. Kerr-McGee Refining Corp. 660 F.2d 1380, 1390 (10th Cir. 1981); Mobil Oil Corp. v. Clark 652 F.2d 2, 3 (8th Cir. 1981).)

The record before this Court is without dispute that the specific time limitations imposed by Section 2802 (b)(2) in which Texaco could assert any rights regarding termination were not complied with. As early as December 1981, Texaco knew that Petitioner was operating a U-Haul Business from the Leased Marketing Premises. This situation continued at the time the parties entered into the New Lease and Agreement of Sale in November 1982. Additionally, this situation continued during the existence of the New Lease for on March 22, 1983, Texaco sent a letter to Petitioner stating that it was objecting to him conducting a U-Haul Business from the Leased Marketing Premises. Further, during the period from March 22, 1983 through December 19, 1983, Texaco was put on notice that Petitioner had no intention of discontinuing or removing his U-Haul Business from the Leased Marketing Premises. Despite this knowledge, Texaco waited until March 12, 1984 before it first notified Petitioner that it was terminating his lease for the Leased Marketing Premises effective June 12, 1984. Thus, Texaco waited **almost exactly one (1) full year** before it

sought to terminate his franchise after it knew that Petitioner would not comply with its demands to cease operating a U-Haul Business from the Leased Marketing Premises, and it is the March 12, 1984 letter which Texaco claims to be the triggering event that terminated Petitioner's franchise. However, under all the time frames of §§2802(b)(A) through (C), Texaco's letter of March 12, 1984 seeking to terminate Petitioner's franchise was time-barred.

The Courts below committed thus reversible error in finding and ordering that the Third Cause of Action for Texaco's withholding its consent to the sale and assignment of the Franchise Agreement was pre-empted by the PMPA, because the same occurred during the period of time that Petitioner's franchise was under notice of termination. The fact is, as discussed above, Texaco's March 12, 1984 letter seeking to terminate Petitioner's franchise was null and void as it was time-barred.

The Courts Below Committed Reversible In Ordering and Sustaining on Appeal Summary Judgment In Favor Of Texaco On The Liability Issue Of Its Second Cause Of Action Of Its Counterclaim For Unlawful Detainer. The acts of the Respondent, Texaco in commencing the unlawful detainer suit and choosing the forum and thereafter forum shopping by removal to the District Court is unjust and a denial of due process which cannot be upheld.

Texaco's Second Cause of Action of its Counterclaim is for unlawful detainer based upon its purported termination of Petitioner's franchise for the Leased Marketing Premises because of Petitioner's operating a U-Haul Business from said premises. (Texaco's letters of March 12, 1984 and July 24, 1984.) As an affirmative defense to this Cause of Action, Petitioner alleged that it failed to state a cause of action because no timely notice of the alleged breach of the franchise agreement was ever given to him within the time

periods specified by 15 U.S.C. §2802(b)(2).

Petitioner's position was supported in the State Court unlawful detainer action. Where there were no differences in the Federal and State law on this point, Texaco should not be permitted to remove this issue to the federal courts while no prosecuting its concurrent state law claims.

Further, California Code of Civil Procedure §1174(a) was amended in 1977 to provide that *"in any action for unlawful detainer brought by a petroleum distributor against a gasoline dealer, possession shall not be restored to the petroleum distributor unless the court in the unlawful detainer action determines that the petroleum distributor had good cause under §20999.1 of the Business and Professions Code to terminate, cancel or refuse to renew the franchise of the gasoline dealer."*

In the case of E.S. Bills, Inc. v. Tzucanow (1985) 38 Cal.3d 824 [215 Cal.Rptr. 278, 700 P.2d 1280], the California Supreme Court noted that "[t]he amendments to section 1174(a) seem intended to assure the gasoline dealer of a day in court on the merits of the dealer and distributor's respective rights under the franchise before the distributor is allowed to re-take possession of the service station." (Id, at Page 831.)

In California Arco Distributors, Inc. v. Atlantic Richfield Co., supra, at p. 349, the court there noted while §20999.1 of the California Business and Professions Code does not have comparable time limits specified by 15 U.S.C. 2802(b)(2) which create a time frame within which a franchisor must act if he desires to terminate a petroleum franchise, nevertheless, §20999.1 requires the franchisor to actually terminate within a reasonable time after learning about a business reason justifying termination. This conclusion follows from the fact that a justifiable or unwarranted delay in terminating will negate the legitimacy of a business reason proffered for termination. (Id, at Pages 360-361.)

Here, aside from multiple issues as to whether Petitioner's operation of a U-Haul Business from the Leased Marketing Premises in fact violated his franchise agreements with Texaco, at the very least, triable issues of fact are present as to whether Texaco was guilty of unwarranted delay in seeking to terminate Petitioner's franchise. In fact, the trial court in Texaco's Orange County Superior Court of California unlawful detainer action (Statement of Facts, supra) found this to be the exact situation and one of the bases for denying Texaco's Motion for Summary Adjudication of Issues. Certainly, under the time limitations imposed by §2802(b)(2) of the PMPA, Texaco's notices were not simply untimely, but they were way beyond any time limitation specified by the PMPA.

CONCLUSION

By way of conclusion, it is respectfully urged that this Honorable Court grant this Petition For Writ Of Certiorari and that the trial Court's March 25, 1988 Order and the July 25, 1988 and August 17, 1990 Judgments must be reversed and the Court of Appeals sustaining such Judgments be reversed upon each of the grounds and for each of the following reasons:

1. The intent of congress in enacting the PMPA 15 USC §2801 et seq. was plainly to afford petroleum franchisees both federal and state law remedies.

2. The federal law does not preempt state law in the areas of franchise renewal or termination unless there is a conflict between state and federal laws.

3. The PMPA plainly does not preempt state law causes of action not contained within the PMPA.

4. A franchisor must not be able to commence a state court action and when unsuccessful remove it and prosecute the action in the Federal Courts.

Respectfully submitted,

PETER M. GWOSDOF

By: Peter M. Gwosdof
Peter M. Gwosdof
Counsel of Record

Hatter Judgments

APPENDIX A

LAWRENCE J. BOOHER, JR.
LESLIE C. RANDALL
10 Universal City Plaza
Suite 1300
Universal City, CA 91608
Telephone: 818-505-3024

Attorneys for Defendant/Counter-claimant
TEXACO REFINING AND MARKETING INC.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

NASR SIMAAN,
Plaintiff/Respondent,
v.
TEXACO INC., a Delaware corporation;
LEO C. BAROLDI; and JOHN DOE
2 through 50, inclusive,
Defendant.

TEXACO REFINING AND MARKETING INC.,
served as DOE I,
Defendant and Counter-claimant,
v.
NASR SIMAAN,
Counter-defendant.

Case No: 87 05216 TJH (Bx)

PROPOSED ORDER GRANTING MOTION OF TEXACO REFINING AND MARKETING INC. FOR SUMMARY JUDGMENT ON PLAINTIFF'S FIRST CAUSE OF ACTION

This matter came on regularly for hearing on March 14, 1988 on Defendant Texaco Refining and Marketing Inc.'s Alternative Motions of Summary Judgment on Plaintiff's first cause of action. Lawrence J. Booher, Jr. appeared as counsel for moving party

Texaco Refining and Marketing Inc. and Peter M. Gwosdof appeared for responding party Nasr Simaan. Defendant Leo C. Baroldi is not a party to the first cause of action and there was no appearance for that party.

The matter having been briefed, argued and submitted, the Court orders that the following facts are undisputed:

1. Plaintiff Simaan commenced this action in state court on July 23, 1983. It was later removed to this court.

2. Simaan's first cause of action is for wrongful termination of a petroleum marketing franchise.

3. Simaan's retailer franchise was terminated by a written notice dated March 12, 1984. The effective date of the franchise termination was June 12, 1984.

4. After June 12, 1984, there were no motor fuel sales transactions between Simaan and his former franchisor. After June 12, 1984, there was no agreement between Simaan and his former franchisor authorizing or permitting Simaan to use the franchisor's trademark in connection with the sale of motor fuel.

The Court further orders that following conclusions of law are applicable to the undisputed facts in this case:

1. At the time Plaintiff commenced this action in state court, published district court opinions in other circuits had held that state courts had concurrent jurisdiction with federal district courts in cases involving the termination or nonrenewal of a petroleum marketing franchise. On that basis, it was reasonable for Plaintiff to have proceeded in state court, and I find derivative jurisdiction in the state court.

2. The Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801, *et seq.* ("PMPA") governs the first cause of action for termination of Simaan's petroleum marketing franchise.

3. The PMPA statute of limitations is one year from later of the date of termination of the franchise or the date the franchisor fails to comply with the PMPA regarding a franchise termination. 15 U.S.C. § 2805(a). In this case, the later date was June 12, 1984, the effective date of the franchise termination.

4. Plaintiff's claim under the PMPA and first cause of action are barred by the one-year PMPA statute of limitations.

WHEREFORE IT IS HEREBY FURTHER ORDERED THAT:

1. Defendant Texaco Refining and Marketing Inc.'s alternative motion for summary judgment on Plaintiff's first cause of action is denied as to the first grounds, lack of derivative jurisdiction, and granted on the alternative grounds, the running of the one-year Petroleum Marketing Practices Act statute of limitations, 15 U.S.C. § 2805(a).

2. The trial of this matter will be limited claims asserted in Plaintiff's second, third and fourth causes of action and to those matters in Texaco Refining and Marketing Inc.'s Counterclaim not effectively decided to this Order.

Date: _____

_____
TERRY J. HATTER, Judge
United States District Court
Central District of California

APPROVED AS TO FORM:

Date: _____

_____
PETER M. GWOSDOF
Attorney for Plaintiff and
Counter-defendant
NASR SIMAAN

Date: March 24, 1988

LAWRENCE J. BOOHER, JR.
LAWRENCE J. BOOHER, JR.
Attorney for Defendant and
Counter-claimant
TEXACO REFINING AND
MARKETING INC.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 10 Universal City Plaza, Universal City, CA 91608. On March 24, 1988, I served the within PROPOSED ORDER GRANTING MOTION OF TEXACO REFINING AND MARKETING INC. FOR SUMMARY JUDGMENT ON PLAINTIFF'S FIRST CAUSE OF ACTION on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Universal City, California addressed as follows:

Peter M. Gwosdof
Suite 251
El Camino Bank Building
451 West Lincoln Avenue
Anaheim, California 92805

Mr. Morton Minikes
A Law Corporation
2001 Wilshire Boulevard
Santa Monica, California 90403

Ms. Janet Powers
Feldsott & Lee
Attorneys at Law
1617 Westcliff Drive
#204
Newport Beach, California 92660

____ (State) I declare under penalty of perjury that the foregoing is true and correct.

____ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on March 24, 1988, at Universal City, California.

GABRIELE SANDOVAL

LODGED
CLERK, U.S. DISTRICT COURT
JULY 1, 1986
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

FILED
JULY 25 1988
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

LAWRENCE J. BOOHER, JR.
LESLIE C. RANDALL
10 Universal City Plaza
Suite 1300
Universal City, CA 91608
Telephone: 818-505-3024

Attorneys for Defendant/Counterclaimant
TEXACO REFINING AND MARKETING INC.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

NASR SIMAAN,
Plaintiff/Respondent,
v.
TEXACO INC., a Delaware corporation;
LEO C. BAROLDI; and
JOHN DOE 2 through 50, inclusive,
Defendant.

TEXACO REFINING AND MARKETING INC.,
served as DOE I,
Defendant and Counter-Complainant,
v.
NASR SIMAAN,
Cross-Defendant.

Case No: 87 05216 TJH (Bx)

PROPOSED JUDGMENT

Texaco Refining and Marketing Inc. has moved for summary judgment on Plaintiff's second and third causes of action and for interlocutory summary judgment on the second cause of action of the counterclaim, or in the alternative for an order specifying facts that appear without substantial controversy. The motion came on regularly for hearing on June 20, 1988. Lawrence J. Booher, Jr. appeared for the moving party, Texaco Refining and Marketing Inc. Peter M. Gwosdof and Morton Minikes appeared for the responding party, Nasr Simaan.

The matter having been argued and submitted and separate Findings of Fact and Conclusions of Law having been signed, the Court orders that Judgment be entered as follows:

1. Summary judgment is granted in favor of Defendant Texaco Refining and Marketing Inc. and against Plaintiff Nasr Simaan on the Second Cause of Action of the Complaint.

2. Summary judgment is granted in favor of Defendant Texaco Refining and Marketing Inc. and against Plaintiff Nasr Simaan on the Third Cause of Action of the Complaint.

3. Interlocutory summary judgment is granted in favor of Counterclaimant Texaco Refining and Marketing Inc. and against Counterdefendant Nasr Simaan as to all liability issues on the second cause of action of the counterclaim.

4. A writ of possession shall be issued forthwith restoring Texaco Refining and Marketing Inc. to possession of the premises at 6000 Cerritos and Valley View, Cypress, California.

5. The only issues remaining to be tried in this case are Texaco Refining and Marketing Inc.'s claims for damages for Nasr Simaan's unlawful detainer and its claim that any such damages be trebled.

Respectfully submitted,

Date: July 1, 1988

LAWRENCE J. BOOHER, JR.

LAWRENCE J. BOOHER, JR.
Attorney for
Defendant/Counterclaimant
TEXACO REFINING AND
MARKETING INC.

IT IS SO ORDERED.

Date: July 25, 1988

TERRY J. HATTER, JR.,

Terry J. Hatter, Jr., Judge
United States District Court
Central District of California

Court of Appeals Decision

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NASAR SIMAAN,
Plaintiff-counter-defendant-Appellant,

vs.

TEXACO REFINING AND MARKETING INC.,
Defendant-counter-claimant-Appellee.

FILED
March 20, 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 90-56113

D.C. No. CV-87-5216-TJH

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted March 6, 1992
Pasadena, California

Before: CANBY, KOZINSKI, and FERNANDEZ,
Circuit Judges

Nasar Simaan appeals the district court's grant of summary judgment and award of damages to defendant-counterclaimant Texaco Refining and Marketing, Inc. (Texaco). Simaan claims

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

that his cause of action under the Petroleum Marketing Practices Act (PMPA) for wrongful termination of a petroleum franchise was not time-barred and that his state-law causes of action were not preempted by the PMPA. Simaan also argues that Texaco should not have been awarded $68,322.14 on its unlawful detainer counterclaim. We affirm.

STATEMENT OF CASE

In January of 1983, Texaco leased to Simaan a service station located at Cerritos and Valley View in Cypress, California. The lease provided that Simaan would not rent trucks from the leased premises. He did anyway. In a separate agreement executed at the same time, Texaco agreed to sell and deliver Texaco gasoline to Simaan. This agreement authorized Simaan to use Texaco's brand names and trademarks.

On March 12, 1984, Texaco wrote to Simaan to inform him that his franchise, including his lease, would be terminated on June 12, 1984 under the provisions of the PMPA because of his continued operation of the truck rental business.[1] Texaco subsequently informed Simaan that his payment of monthly rent for June and July created a month-to-month tenancy that began upon the termination of his Texaco franchise. Texaco stated that Simaan's month-to-month tenancy was terminated effective August 31, 1984, at which time he was to surrender possession of the leased premises. Texaco made it clear that Simaan's holdover tenancy did not extend the supply agreement between Texaco and Simaan.

Simaan filed suit against Texaco on July 23, 1985. He alleged that Texaco wrongfully terminated his petroleum franchise in violation of the PMPA. He also alleged that Texaco violated state law by wrongfully failing to deliver gasoline and wrongfully withholding consent to the sale or assignment of Simaan's franchise. Texaco counterclaimed against Simaan for unlawful detainer.

---

[1]The notice included a statement of his PMPA rights.

The district court ruled that Simaan's cause of action under the PMPA was time-barred and that Simaan's state law causes of action were preempted by the PMPA. The district court also granted summary judgment to Texaco as to Simaan's liability for the unlawful detainer counterclaim. After a trial to determine Texaco's damages for Simaan's wrongful detention of the leased premises, the court awarded Texaco $68,322.14 plus costs.

DISCUSSION

A. *PMPA Statute of Limitations*

In order to maintain a cause of action under the PMPA, Simaan was required to file suit within one year of the termination of his Texaco franchise. 15 U.S.C. § 2805(a)(1). After June 12, 1984, Texaco allowed Simaan to hold over on a month-to-month basis ending August 31, 1984, but Simaan had no motor fuel supply agreement with Texaco and no agreement with Texaco for the use of its trademark. We have construed franchise to mean "the combination of the franchisee's use of a franchisor's trademark, the lease of a service station, and the motor fuel supply contract." *Svela v. Union Oil Co. of Cal.*, 807 F.2d 1494, 1500 (9th Cir. 1987). *See Fresher v. Shell Oil Co.*, 846 F.2d 45, 46-47 (9th Cir. 1988); *Prestin v. Mobil Oil Corp.*, 741 F.2d 268, 272 (9th Cir. 1984). Therefore Simaan's month-to-month holdover tenancy of the service station alone does not constitute a franchise between Texaco and Simaan. The district court properly held that Simaan's franchise was terminated on June 12, 1984. Because Simaan filed suit on July 23, 1985, more than one year after the termination of his franchise, his cause of action under the PMPA is barred by the statute of limitations. 15 U.S.C. § 2805(a).

B. *Preemption of State-Law Claims*

The PMPA preempts all state laws concerning the termination of petroleum franchises if the state laws are not the same as the PMPA. 15 U.S.C. § 2806(a); *In re Herbert*, 806 F.2d 889, 892 (9th Cir. 1986). Texaco stopped selling gasoline to Simaan when it terminated his franchise. Simaan's state-law claim that Texaco wrongfully refused to sell him gasoline clearly involves the termi-

nation of his franchise and is thus preempted by the PMPA. The same is true of Simaan's claim that Texaco wrongfully withheld consent to the sale or assignment of his franchise. We have held that state-law claims for wrongful refusal to consent to the assignment of a petroleum franchise when the franchisee is under notice of termination are preempted by PMPA. *Humbolt Oil Co., Inc. v. Exxon Co., U.S.A.*, 823 F.2d 373, 375 (9th Cir. 1987), *cert. denied*, 485 U.S. 1021, 108 S.Ct. 1575, 99 L.Ed.2d 890 (1988).

C. *Texaco's Damages for Unlawful Detainer*

The district court did not err by awarding Texaco $68,322.14 plus costs on its unlawful detainer counterclaim. Texaco complied with the time limitations of PMPA when it terminated Simaan's franchise. 15 U.S.C. § 2802(b)(2)(B). Simaan's holdover month-to-month tenancy was terminated effective August 31, 1984 and Simaan has not shown that he had lawful possession of the service station after that date. Texaco was entitled to damages equal to the fair market value of the premises. *Pfitzer v. Candeias*, 53 Cal.App. 737, 741, 200 P. 839 (1921). The district court did not clearly err by calculating Texaco's damages using the rental formula that Texaco customarily uses in its dealings with its franchisees.

AFFIRMED.

Order Denying Rehearing

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NASAR SIMAAN,
Plaintiff-counter-defendant-appellant,

v.

TEXACO REFINING AND MARKETING, INC.,
Defendant-counter-claimant-appellee.

FILED
May 11, 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No: 90-56113

ORDER

Before: CANBY, KOZINSKI and FERNANDEZ,
Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing.

Therefore, the petition for rehearing is DENIED.

Peter M. Gwosdof, Esq.
451 West Lincoln Avenue
Suite 251
Anaheim, CA 92805

PMPA

APPENDIX D

FRANCHISE PROTECTION

§2801 Definitions

As used in this title:

(1)(A) The term "franchise" means any contract-

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer, under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes-

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed-

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as

defined by the preceding provisions of thisparagraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who-

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing

premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include-

(A) any failure which is only technical or unimportant to the franchise relationship; or

(B) any failure for a cause beyond the reasonable control of the franchisee.

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship-

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after the date of enactment of this Act [enacted June 19, 1978] of the relevant franchise which was entered into prior to such date of enactment and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.
(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce-

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

§2802. Franchise relationship

(a) General prohibition against termination or nonrenewal. Except as provided in subsection (b) and section 103 [15 USCS § 2803(b)], no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may-

(1) terminate any franchise (entered into or renewed on or after the date of enactment of this Act [enacted June 19, 1978]) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b) Precondition and grounds for termination or nonrenewal.

(1) Any franchisor may terminate any franchise (entered into or renewed on or after the date of enactment of this Act [enacted June 19, 1978]) or may fail to renew any franchise relationship, if-

(A) the notification requirements of section 104 [15 USCS § 2804] are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure-

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant

to section 104(a) [15 USCS §2804(a)]; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1) [15 USCS § 2804(b)(1)].

(B) A failure by the franchises to exert good faith efforts to carry out the provisions of the franchise, if-

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 104 [15 USCS § 2804].

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence-

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(a) [15 USCS § 2804(a)]; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1) [15 USCS § 2804(b)(1)].

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if-

(i) such agreement is entered into not more

than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 104(d) [15 USCS § 2804(d)]; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to the date of the enactment of this Act [enacted June 19, 1978], and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if-

(i) such determination-

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises-

(I) the franchisor, during the 180-day period after notification was given pursuant to section 104 [15 USCS § 2804], either made bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchiser and the franchisee to agree to changes or additions to the provisions of the franchise, if-

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if-

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to the date of the enactment of this Act [enacted June 19, 1978] (the unexpired term of which, on such date of enactment, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if-

(i) such determination is-

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such deter-

mination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 104 [15 USCS § 2804], either-

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

(c) **Definition.** As used in subsection (b)(2)(C), the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as-

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchises;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if the franchisee was notified in writing, prior to the commencement of the term of

the then existing franchise-

(A) of the duration of the underlying lease, and

(B) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for-

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

(d) Compensation, etc., for franchisee upon condemnation or destruction of marketing premises. In the case of any

termination of a franchise (entered into or renewed on or after the date of enactment of this Act [enacted June 19, 1978]), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed)-

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5), the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

§ 2803. Trial and interim franchises

(a) Nonapplicability of statutory nonrenewal provisions. The provisions of section 102 [15 USCS § 2802] shall not apply to the nonrenewal of any franchise relationship-

(1) under a trial franchise; or

(2) under an interim franchise.

(b) Definitions. For purposes of this section-

(1) The term "trial franchise" means any franchise-

(A) which is entered into on or after the date of enactment of this Act [enacted June 19, 1978];

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously-

(i) that the franchise is a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 104 [15 USCS § 2804], of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 102 [15 USCS § 2802], limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of the franchise

or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise-

(A) which is entered into on or after the date ofthe enactment of this Act [enacted June 19, 1978];

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal-

(i) was based upon a determination described in section 102(b)(2)(E) [15 USCS § 2802(b)-(2)(E)], and

(ii) the requirements of section 102(b)(2)-(D)[15 USCS § 2802(b)(2)(E)] were satisfied; and

(E) which is in writing and states clearly and conspicuously-

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 102(b)(2)(E)(ii) and (iii) [15 USCS § 2802(b)(2)(E)(ii) and (iii)] are satisfied.

(c) Nonrenewal upon meeting statutory notification re-

quirements. If the notification requirements of section 104 [15 USCS § 2804] are met, any franchisor may fail to renew any franchise relationship-

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if-

(A) such nonrenewal is based upon a determination described in section 102(b)(2)(E) [15 USCS § 2802(b)(2)(E); and

(B) the requirements of section 102(b)(2)(E)(ii) and (iii) [15 USCS § 2802(b)(2)(E)(ii) and (iii)] are satisfied.

§ 2804. Notification of termination or nonrenewal of franchise relationship

(a) General requirements applicable to franchisor. Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship-

(1) in the manner described in subsection (c); and

(2) except as provided in subsection (b), not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

(b) Additional requirements applicable to franchisor. (1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2-

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor-

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins-

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 102(b)(2)(E) or section 103(c)(2) [15 USCS §§ 2802(b)(2)(E) or 2803(c)(2)], the franchisor shall-

(A) furnish notification to the franchisee not less than 180 days prior to the date on which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

(c) **Manner and form of notification.** Notification under this section-

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain-

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d).

(d) **Preparation, publication, etc., of statutory summaries.**

(1) Not later than 30 days after the date of enactment of this Act [enacted June 19, 1978], the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this title, including a statement of the respective responsibilities of, and the remedies and relief avail-

able to, any franchisor and franchisee under this title.

(2) In the case of summaries required to be furnished under the provisions of section 102(b)(2)(D) [15 USCS § 2802(b)(2)(D)] or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

§ 2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action. If a franchisor fails to comply with the requirements of section 102 or 103 [15 USCS §§2802 or 2803], the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of-

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 102 or 103 [15 USCS §§ 2802 or 2803].

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers. (1) In any action under subsection (a), the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 102 or 103 [15 USCS §§ 2802 or 2803], including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief. (2)

Except as provided in paragraph (3), in any action under subsection (a), the court shall grant a preliminary injunction if-

(A) the franchisee shows-

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a), the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced-

(A) more than 90 days after the date on which notification pursuant to section 104(a) [15 USCS § 2804-(a)] was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 104(b)(2) [15 USCS §2804-(b)(2)] was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 104(b)(1) [15 USCS § 2804(b)(1)].

(c) **Burden of proof; burden of going forward with evi-**

dence. In any action under subsection (a), the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 102(b) or 103 [15 USCS §§ 2802(b) or 2803], and, if applicable, that such franchisor complied with the requirements of section 102(d) [15 USCS § 2802(d)].

(d) Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous action. (1) If the franchisee prevails in any action under subsection (a), such franchisee shall be entitled-

(A) consistent with the Federal Rules of Civil Procedure [USCS, Federal Rules of Civil Procedure], to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 102 or 103 [15 USCS §§ 2802 or 2803], or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a), the court may, in its discretion, direct that reasonable attorney and expert witness-fees be paid by the franchisee if the court finds that such action is frivolous.

(e) Discretionary power of court to compel continuation or

renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected. (1) In any action under subsection (a) with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 102 [15 USCS § 2802], the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that-

(A) The basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business-

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 104 [15 USCS § 2804] have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) if such nonrenewal is prohibited by section 102 [15 USCS § 2802].

§ 2806. Relationship of statutory provisions to State and local laws

(a) To the extent that any provision of this title applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this title.

(b) Nothing in this title authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

Business and Professions Code

APPENDIX E

CHAPTER 7.5

Franchises

[Division 8, Special Business Regulations-Chapter 7.5, Franchises; Chapter added Stats 1975 ch 640 U1.]

Section	
20999	Definitions
20999.1	Termination without good cause
20999.2	Presence of counsel or personal representative during negotiations of franchise terms
20999.25.	Franchisee's right of first refusal
20999.3.	Remedy for violation of chapter
20999.4.	Franchisor's withdrawal from retail marketing

§20999. Definitions

For purposes of this chapter, the following terms shall have the following meanings:

(a) "Franchise" means any contract between a refiner and a distributor, between a refiner and a retailer, between a distributor and another distributor, or between a distributor and a retailer, under which a refiner or distributor authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of gasoline, diesel, gasohol, or aviation fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies fuel to the distributor which authorizes or permits such use. The term "franchise" includes the following:

(1) Any contract under which a retailer or distributor is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies fuel to the distributor which authorizes or permits such occupancy.

(2) Any contract pertaining to the supply of fuel which is to be sold, consigned, or distributed under a trademark owned or controlled by a refiner, or under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, fuel was sold, consigned, or distributed under a trademark owned and controlled on such date by a refiner.

(3) The unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of state law which permits such transfer or assignment without regard to any provision of the franchise.

(b) "Franchise relationship" means the respective fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of fuel under a franchise.

(c) "Franchisor" means a refiner or distributor who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of fuel.

(d) "Franchises" means a retailer or distributor who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of fuel.

(e) "Refiner" means any person engaged in the refining of crude oil to produce fuel, and includes any affiliate of such person.

(f) "Distributor" means any person, including any affiliate of such person, who either purchases fuel for sale, consignment,

or distribution to another, or receives fuel on consignment for consignment or distribution to his or her own fuel accounts or to accounts of his or her supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(g) "Retailer" means any person who purchases fuel for sale to the general public for ultimate consumption.

(h) "Marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of fuel.

(i) "Leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of fuel.

(j) "Contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(k) "Trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(l) "Fuel" means gasoline, diesel, gasohol, or aviation fuel.

(m) "Failure" does not include any failure for a cause beyond the reasonable control of either the franchise relationship or the franchisee.

(n) "Fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship at any of the following times:

(1) At the conclusion of the term, or on the expiration date, stated in the relevant franchise.

(2) At any time, in the case of the relevant franchise which does not state a term of duration or an expiration date.

(3) Following a termination, on or after the effective date of this act, of the relevant franchise which was entered into

prior to the effective date of this act and has not been renewed after that date.
(o) "Affiliate" means any person who, other than by means of a franchise, controls, is controlled by, or is under common control with, any other person.
(p) "Relevant geographic market area" includes this state or a standard metropolitan statistical area within this state which has been established by the United States Office of Management and Budget.
(q) "Termination" includes cancellation.

§20999.1 Termination without good cause

Notwithstanding the terms of any franchise, no franchisor shall terminate, cancel, or fail to or refuse to renew any existing franchise without good cause.
As used in this section good cause is limited to the following:

(a) The gasoline dealer or petroleum distributor failed to comply with essential and reasonable requirements of the franchise agreement;

(b) The gasoline dealer or petroleum distributor failed to act in good faith in carrying out the terms of the franchise; or

(c) The franchisor is withdrawing from the marketing location at which the franchise of a gasoline dealer is located, provided that the franchisor pays the gasoline dealer the current wholesale market value for all qualifying equipment and supplies purchased by the gasoline dealer from the franchisor or affiliate of the franchisor. This subdivision shall only apply to those gasoline dealer franchises which are entered into or renewed on or after January 1, 1979. As used in this subdivision, "qualifying equipment and supplies" means all equipment and supplies purchased by the gasoline dealer from the franchisor or an affiliate of the franchisor which is free and clear of all liens, security interests and

other encumbrances, valued on a first-in, firstout basis, evidenced by receipted invoices, and is (i) in first-class and resalable condition, (ii) in the original packages or containers and (iii) bears the original labels and trademarks, and (iv) the goods display no evidence of deterioration. This subdivision shall not be construed to create any priority over any other debt between the parties to the franchise arising from the same franchise agreement.

(d) For other legitimate business reasons (except that a termination, or cancellation of a franchise for the purpose of enabling the petroleum distributor or manufacturer to assume operation of the distributor's or gasoline dealer's business shall not be considered to be a legitimate business reason unless the gasoline dealer or distributor is paid reasonable compensation for the value of his franchise, including a reasonable amount for goodwill).

§20999.2. Presence of counsel or personal representative during negotiations of franchise terms

No petroleum distributor shall deny to any gasoline dealer or prospective gasoline dealer the right to be accompanied by counsel or a personal representative to any meeting held between the parties for the purpose of negotiating the terms of a franchise.

§20999.25. Franchisee's right of first refusal

(a) In the case of leased marketing premises as to which the franchisor owns a fee interest, the franchisor shall not sell, transfer, or assign to another person the franchisor's interest in the premises unless the franchisor has first either made a bona fide offer to sell, transfer, or assign to the franchisee the franchisor's interest in the premises, other than signs displaying the franchisor's insignia and any other trademarked, servicemarked, copyrighted or patented items of the franchisor, or, if applicable, offered to the franchisee a right of first refusal of any bona fide offer acceptable to the

franchisor made by another to purchase the franchisor's interest in the premises. (b) In the case of leased marketing premises which the franchisor leases from a third party, following notice by the franchisor to the franchisee of termination or nonrenewal of the franchise by reason of the expiration of the franchisor's underlying lease from the third party, the franchisor shall, upon request by the franchisee and subject to the franchisee purchasing or leasing the premises from the third party prior to the date of termination or nonrenewal of the franchise set forth in the notice, make a bona fide offer to sell to the franchisee any interest the franchisor may have in the improvements on the premises, other than signs displaying the franchisor's insignia and any other trademarked, servicemarked, copyrighted or patented items of the franchisor, at a price not to exceed the fair market value of the improvements or the book value, whichever is greater, or, if applicable, offer the franchisee a right of first refusal of any bona fide offer acceptable to the franchisor made by another to purchase the franchisor's interest in the improvements. For the purposes of this subdivision, "book value" means actual cost less actual depreciation taken.

(c) Nothing in this section shall be deemed to require a franchisor to continue an existing franchise agreement or to renew a franchise relationship if not otherwise required by federal law.

(d) For the purposes of this section, the following terms shall have the following meanings:

(1) "Marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of motor fuel.

(2) "Leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and

which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

§20999.3. Remedy for violation of chapter

(a) Any person who violates any provision of this chapter may be sued in the superior court in the county in which the defendant resides or where a franchise affected by the violation does business, for temporary and permanent injunctive relief and for damages, if any, and the costs of suit.

(b) No action shall be maintained to enforce any liability created under any provision of this chapter unless brought before the expiration of two years after the violation upon which it is based or the expiration of one year after the discovery by the plaintiff of the facts constituting such violation, whichever occurs first.

§20999.4. Franchisor's withdrawal from retail marketing

At such time as a franchisor intends to withdraw from the marketing of fuel through retail and distribution outlets in the relevant geographic market area, prompt notification, together with a plan describing the schedule and conditions of the withdrawal, shall be provided by the franchisor to the Governor.

§21140. Definitions

For purposes of this chapter, the following terms shall have the following meanings:
(a) "Franchise" means any contract between a refiner and a distributor, between a refiner and a retailer, between a distributor and another distributor, or between a distributor

and a retailer, under which a refiner or distributor authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of gasoline, diesel, gasohol, or aviation fuel, a trademark which is owned or controlled by such refiner or by, a refiner which supplies fuel to the distributor which authorizes or permits such use. The term "franchise" includes the following:

(1) Any contract under which a retailer or distributor is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies fuel to the distributor which authorizes or permits such occupancy.

(2) Any contract pertaining to the supply of fuel which is to be sold, consigned, or distributed under a trademark owned or controlled by a refiner, or under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, fuel was sold, consigned, or distributed under a trademark owned and controlled on such date by a refiner.

(3)The unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of state law which permits such transfer or assignment without regard to any provision of the franchise.

(b) "Franchisor" means a refiner or distributor who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of fuel.

(c) "Franchises" means a retailer or distributor who is

authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of fuel.

(d) "Refiner" means any person engaged in the refining of crude oil to produce fuel, and includes any affiliate of such person.

(e) "Distributor" means any person, including any affiliate of such person, who either purchases fuel for sale, consignment, or distribution to another, or receives fuel on consignment for consignment or distribution to his or her own fuel accounts or to accounts of his or her supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(f) "Retailer" means any person who purchases fuel for sale to the general public for ultimate consumption.

(g) "Marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of fuel.

(h) "Leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of fuel.

(i) "Contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(j) "Trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(k) "Fuel" means gasoline, diesel, gasohol, or aviation fuel.

(l) "Affiliate" means any person who, other than by means of a franchise, controls, is controlled by, or is under common control with, any other person.

§21140.1. Franchisee's purchase of fuel from other sources Notwithstanding the terms of any franchise, a franchisee shall not be precluded from purchasing fuel from any available source if the franchisor is unable or refuses to supply the franchisee with fuel. Failure to deliver contracted, agreed upon, or requested quantities of fuel within 72 hours of such specified contract time, agreement, or request shall constitute an inability or refusal to supply a franchisee. Requests for deliveries of fuel may be telephoned to the franchisor, except that when the franchisee intends to seek fuel from another supplier pursuant to Section 21140.1 should the franchisor be unable or refuse to supply him or her, a request for fuel must be made in writing to a franchisor at least 48 hours before desired delivery.

Once such notice has been given, and the franchisor has failed to deliver contracted, agreed upon, or requested quantities of fuel no further written request shall be required from the franchisee until such time as the franchisor notifies the franchisee in writing that the franchisor is prepared to deliver contracted, agreed upon, or requested quantities of fuel.

Nondelivery of fuel by the franchisor due to accident, fire, theft or other similar acts shall not constitute an inability or refusal to supply the franchisee.

If the franchisee sells fuel supplied from a source other than the franchisor, the franchisee shall prominently post a sign disclosing this fact to the public on each pump dispensing fuel purchased from other than the franchisor. The sign

shall not be smaller than 8" X 10" with letters not less than three inches in height.

This provision shall not be construed to permit a franchisee to purchase more fuel than may be allowed by any federal statute or regulation.

§21140.2 Required purchase of automotive accessories
From the effective date of this section it shall be illegal for any franchisor by any action to require a franchisee to purchase only those tires, batteries, and other automotive accessories sold by the franchisor. A franchised retail gasoline dealer may sell any tired, batteries, and other automotive accessories as may be available to him for retail sale.

§21140.3. Penalty for violation of chapter
The franchisor's executive officer, representative or agent of the franchisor who negatiates any contract in violation of this chapter or who otherwise coerces a franchisee in violation of this chapter shall be subject to a civil penalty of up to fifty thousand dollars ($50,000) for each offense.

Such penalty shall be assessed and recovered in a civil action brought by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction. If brought by a district attorney or county counsel, the entire amount of the penalty shall be paid to the treasurer of the county in which the judgment was entered. If brought by the Attorney General, one-half of the penalty shall be paid to the treasurer of the county where the action was brought and one-half shall be paid to the State Treasurer. If brought by a city attorney, one-half of the penalty shall be paid to the treasurer of the county and one-half to the city.

§21140.4. Remedy of person injured by violation of chapter

Any person who is injured in his business or property by reason of a violation of this chapter may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded attomeys' fees together with the costs of the suit. Any action brought pursuant to this section shall be commenced within four years after the cause of action accrued.

§§ 21140.6. Franchisee's designation, prior to death, of successor-in-interest; Conditions; Operation of franchise following death of franchisee

(a) On and after January 1, 1980, it shall be unlawful to include in any franchise agreement any term which provides for the termination of the franchise by the franchisor upon the death of the franchisee if the franchisee, prior to his demise, designates a successor-in-interest in a form prescribed by and delivered to the franchisor.
(b) For the purposes of this section, "successor-in-interest" shall be restricted to either a surviving spouse or adult child of the franchisee, provided that such spouse or child, at the time of the franchisee's death, shall meet the reasonable qualifications then being required of dealers by the franchisor for the operation of such service stations.
(c) This section shall not apply to a "trial franchise" as defined in the Petroleum Marketing Practices Act (Public Law 95-297).
(d) The designated successor-in-interest shall be allowed 21 days after the death of the franchisee to give written notice of his or her election to assume and operate the franchise. The notification shall contain such information regarding business experience and creditworthiness as is reasonably required by the franchisor. The successor-in-interest must offer to assume the franchise in writing three days (excluding

Saturdays, Sundays, and holidays) after such election and must commence operation of the franchise within 10 days after it has been assumed.

(e) Franchisors may require that franchisees desiring to designate a successor-in-interest pursuant to this section deposit with the franchisor at the time of such designation such sum as would be reasonably estimated to be necessary to compensate the franchisor for rent for a period of 21 days. This deposit is intended to compensate the franchisor in the event the designated successor-in-interest fails for such period after the death of the franchisee to assume the franchise obligation. Any unearned portion of such deposit resulting from the successor-in-interest assuming responsibility for the franchise sooner than 21 days after the date of the franchisee's death, or from the temporary operation of the facility by the franchisor during such 21 days, shall be refunded by the franchisor to the estate or legal representative of the deceased franchisee. In addition to such deposit, the franchisor may require a franchisee desiring to qualify under this section to arrange for the discharge or performance of other franchise obligations such as, but not limited to, insurance, but excluding any obligation to be open to the public, for a period of up to 21 days after his demise.

(D The franchise available to the successor-in-interest pursuant to this section is intended to be no greater than or less than the franchise as it existed in the name of the deceased franchisee at the time of such franchisee's death. This section is not intended to expand or diminish the rights of franchisors or franchisees under either federal or state law.

(g) A franchisee may designate a primary and one alternate successorin-interest. The alternate, if one is designated, shall have no rights under this section in the event of any exercise of rights by the primary successor-in-interest. If an alternate desires to assume and operate the franchise in the event the primary successor-in-interest fails to do so, the alternate must ive notice of such election and otherwise comply with

paragraph (d) of this section.

(h) Unless otherwise specifically provided herein, any actions to be performed by the franchisor or by the successor-in-interest hereunder shall in each instance be performed within a reasonable time.

(i) Unless the franchisor otherwise agrees in writing, there shall be no operation of the franchise following the death of the franchisee by anyone (other than the franchisor for its own account) until all parts of the franchise have been expressly assumed as herein provided, including, but not limited to, such items as lease or leases, products agreement, loaned equipment agreement, federal and state environmental law compliance agreements, licensing, and tax permits.

(j) Following the death of a franchisee, and prior to the operation of the franchise by the successor-in-interest as herein provided, the franchisor shall have the option to operate the franchise by contract or otherwise for its own account without obligation or duty to the heirs or estate of the deceased franchisee or to the successor-ininterest except for the obligation to account to the heirs or the estate of the deceased franchisee for the inapplicable portion of any prepaid rent or other sums prepaid to the franchisor, and for any physical inventory salvaged from the franchise and used or sold by the franchisor.

(k) If the successor-in-interest assumes the franchise and there has been no intervening operation of the franchise by the franchisor, the successor-in-interest shall account to the heirs or estate of the deceased franchisee for the value or other disposition of personal property of the franchisee located at or related to the franchise.

(l) The liability for failure to comply with this section shall be limited to those damages provided by Section 3300 of the Civil Code. Any action pursuant to this section shall be commenced within one year after the cause of action accrued.

(m) In the event any provision of this section is deemed void

or unenforceable, the remaining portions, to the extent severable, shall be given effect.

§21148. Withholding of consent to sale, transfer, or assignment of franchise; Transfer fee

(a) Notwithstanding the terms of any franchise, a franchisor may not withhold its consent to the sale, transfer, or assignment of the franchise by the franchisee to another person unless the franchisor demonstrates any of the following:

(1) The proposed purchaser of the franchise has less business experience and training than that normally required by the franchisor of prospective franchisees.
(2) The proposed purchaser of the franchise has less financial resources than that normally required by the franchisor of prospective franchisees.
(3) The proposed purchaser of the franchise does not satisfy the thencurrent uniformly applied requirements, if any, of the franchisor applicable to prospective franchisees.
(4) The proposed purchaser of the franchise operates a franchise under an agreement with a franchisor other than the franchisor to whom the sale, transfer, or assignment is proposed, if the then-current uniformly applied requirements, if any, of the franchisor precludes prospective franchisees from operating a franchise under an agreement with another franchisor.
(5) The franchises has not offered in writing to sell, transfer, or assign the franchise to the franchisor on terms and conditions which are the same as those of the sale, transfer, or assignment of the franchise to the proposed purchaser; and the franchisee has not allowed the franchisor at least 30 days in which to either accept or decline the franchisee's written offer, prior to the sale, transfer, or assignment of the franchise to the proposed purchaser.
(b) If the franchisor consents to the sale, transfer, or assignment of the franchise to a prospective purchaser, the

franchisor may require the franchisee to pay a transfer fee to the franchisor, provided the amount of the fee is reasonable when compared to the sale price of the franchise and provided the fee is not required in an effort to frustrate the proposed sale.

§21149. Conditions precluding prohibition or prevention of sale, transfer, or assignment of franchise

Notwithstanding the terms of any franchise, the franchisor may not prohibit or prevent the sale, transfer, or assignment of the franchise to a corporation if both of the following conditions are satisfied:

(a) The franchisee has a controlling interest in the corporation.

(b) The franchisee offers in writing to personally guarantee the corporation's performance of its obligations under the franchise.

§21150. Definitions

For purposes of this chapter, the following terms shall have the following meanings:

(a) "Franchise" means any contract between a refiner and a distributor, between a refiner and a retailer, between a distributor and another distributor, or between a distributor and a retailer, under which a refiner or distributor authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies fuel to the distributor which authorizes or permits such use. The term "franchise" includes the following:

(1) Any contract under which a retailer or distributor is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of fuel under a trademark which is owned or controlled by such refiner or by a

refiner which supplies fuel to the distributor which authorizes or permits such occupancy.

(2) Any contract pertaining to the supply of fuel which is to be sold, consigned, or distributed under a trademark owned or controlled by a refiner, or under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, fuel was sold, consigned, or distributed under a trademark owned and controlled on such date by a refiner.

(3) The unexpired portion of any franchise, as defined b the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of state law which permits such transfer or assignment without regard to any provision of the franchise.

(b) "Franchisor" means a refiner or distributor who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of fuel.

(c) "Franchises" means a retailer or distributor who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of fuel.

(d) "Refiner" means any person engaged in the refining of crude oil to produce fuel, and includes any affiliate of such person.

(e) "Distributor" means any person, including any affiliate of such person, who either purchases fuel for sale, consignment, or distribution to another, or receives fuel on consignment for consignment or distribution to his or her own fuel accounts or to accounts of his or her supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(f) "Retailer" means any person who purchases fuel for sale to the general public for ultimate consumption.

(g) "Marketing premises" means, in the case of any franchise,

premises which, under such franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of fuel.

(h) "Leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of fuel.

(i) "Contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(j) "Trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(k) "Fuel" means gasoline, diesel, gasohol, or aviation fuel.

(l) "Affiliate" means any person who, other than by means of a
franchise, controls, is controlled by, or is under common control with,
any other person.

§21150.1. Franchisee's hours of operation; Applicability

(a) In all future franchise agreements no retail gasoline dealer who operates pursuant to a franchise shall be required by the franchisor to operate the service station during hours that are not propfitable to the franchisee, provided the hours of operation that are maintained by the franchisee are for a continuing period of time.

(b) In the event that the terms and conditions of the franchise require the franchisee to maintain hours of operation that the franchisee has determined in good faith to be unprofitable the franchisee shall notify the franchisor in writing of his or her determination that a certain period or periods are not profitable and provide the franchisor with any studies, analyses, summaries, business records, or other documents that the franchisee prepared or reviewed to determine that operation of the service station during the

period or periods were unprofitable.

(c) In the event that the franchisor in good faith is not satisfied that the operation of the service station is not profitable during the periods specified in the notice after the franchisor has reviewed the statements, studies, analyses, summaries, business records, or other documents submitted by the franchisee, the franchisor may may prepare its own statements, studies, analyses, summaries, business records, or other documents regarding the profitability of operation of the service station during the period specified by the franchise. The franchisee shall rimburse the franchisor for the actual cost incurred by the franchisor in preparing any statements, studies, analyses, summaries, business records or other documents to verify the franchisee's determination that it is not profitable to operate during the period or or periods periods specified in the notice, not to exceed the sum of three hundred dollars ($300).

(d) In the event the franchisor and franchisee still do not agree regarding the profitability of certain hours of operation, the franchisor and franchisee shall conduct arbitration in accordance with the rules of the American Arbitration Association. The decision of the arbitrator shall be final.

(e) The franchises may establish and maintain the hours of operation of the service station without regard to the hours specified in the franchise:

(1) If the franchisor fails to notify the franchisee of his or her intent to prepare statements studies, analyses, summaries, business records, or other documents to verify the franchisee's determination that it is not profitable to operate during the period or periods specified in the notice after receipt of the franchisee's notice.

(2) If the franchisor fails to complete the preparation of the statements, studies, analyses, summaries, business

records, or other documents within 30 days after the receipt of notice from the franchisee.
(3) If it is established pursuant to subdivisions (b) to (d), inclusive, that the operation of the service station is not profitable during the period or periods specified by the franchisee.

(f) For the purposes of this section, the terms "unprofitable" and "not profitable" shall mean that the amount of the gross revenues generated by the sales of motor fuels and other petroleum products, as well as related automotive accessories, is less than the amount of the expenses incurred by the franchisee to operate during the period or periods the franchisee specified in the written notice, including the proportionate costs for rent, labor, or other fixed or variable overhead costs that may be reasonably allocated to the operation of the service station during the period or periods that the franchisee specified in the written notice.
(g) This section shall not apply:
(1) Where specific hours of business or operation are required under the franchisor's prime lease or license from any governmental entity, airport, parking, marine or port authority, shopping center, or any private investor not affiliated with or controlled by the franchisor; or,

(2) Where the retail gasoline station subject to the franchise agreement is located within one-half mile access of any highway which is a part of the Califomia freeway and expressway system, provided, however, that if there is not commercial property developed as a service station within one-half mile of an entry to or exit from any such highway, the exception shall extend to the first such development and extend one-quarter mile beyond in all directions. This section is also not applicable to any business which is not primarily a gasoline station, but which sells gasoline incidentally to its business.

§21200. Price discrimination

It is unlawful for any refiner, distributor, manufacturer, or transporter of motor vehicle fuels or oils engaged in business in this state, either directly or indirectly, to discriminate in price between different purchasers of motor vehicle fuels or oils of like grade and quality, where the effect of such discrimination is to lessen competition, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

Upon proof being made, at any hearing on a complaint under this section, that there has been such discrimination in price, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section. Nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor and was also offered to any other of his purchasers in competition with the purchaser or purchasers receiving such lower price. If such lower price should be incorporated into a term contract, no such contract shall as to such discriminatory price be valid for more than one year. Nothing in this section shall prevent differentials which make only due allowance for differences in the cost of manufacture, marketing, transportation, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

Nothing in this section shall prevent persons engaged in selling motor vehicle fuels or oils in this state from selecting their own customers in bona fide transactions and not in restraint of trade.

Nothing in this section shall prevent price changes from time to time where in response to changing conditions affecting

the market for, or the marketability of, the products concemed, such as, but not limited to, actual or imminent deterioration of products, distress sales under court process, or sales in good faith in discontinuance of business in the products concerned.
Nothing in this section shall apply to the purchase of motor vehicle fuels or oils for their own use by state and local agencies or public utilities.

§21201. Application of provisions
The provisions of this chapter shall only apply to refiners, distributors, manufacturers, or transporters of petroleum products engaged in business in this state whose total production, gasoline refining capacity or sales volume at the wholesale level is 50,000 barrels a day or more.

§21202. Right of action; Triple damages

Any person injured by any violation of the provisions of this chapter may bring an action for the recovery of damages. Judgment may be entered for three times the amount at which the actual damages are assessed plus reasonable attomey's fees.

§21203. Legislative finding and declaration; Nonconforming agreements void

The Legislature finds and declares that distribution and sales of motor vehicle fuels and oils in the State of California affect the general economy of the state, the public interest and the public welfare. Competition and freedom from unreasonable discriminatory practices are essential to the fair and efficient functioning of a free market economy. Competative conditions are rapidly changing with resulting market dislocation. Therefore it is further provided that any existing contracts, arrangements, or agreements with

provisions for prices not in compliance with this chapter shall be void on and after the effective date of this chapter as to such provisions except for any as may be required to be extended beyond said date to comply with any applicable federal price control laws, regulations or orders.

Supreme Court, U.S.
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(2)

No. 92-208

In The

Supreme Court of the United States

October Term, 1992

NASAR SIMAAN,

Petitioner,

vs.

TEXACO REFINING AND MARKETING INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TIMM A. MILLER, Counsel of Record
STEVEN E. KNOTT
10 Universal City Plaza, 13th Floor
Universal City, California 91608
(818) 505-3033

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether an action with respect to the termination of a petroleum franchise under the Petroleum marketing Practices Act ("PMPA") was properly heard in the U. S. District Court when the PMPA provides expressly that the U. S. District Courts have original jurisdiction over PMPA actions and when Petitioner never moved to remand the action to the state court?

B. Whether a challenge to the termination of a petroleum franchise under the PMPA is barred under the one-year limitations period of the PMPA when the franchisee files his action more than one year after the express date of termination of the franchise as set forth in a notice of termination and more than one year after the franchiser ceases to deliver motor fuel pursuant to said notice of termination?

C. Whether the PMPA's express preemption of all state law not the "same as" the PMPA preempts California State law claims for damages due to the termination of a motor fuels franchise when the PMPA's one-year statute of limitations bars such a challenge?

D. Whether the District Court erred in granting judgment on Texaco's counterclaim for unlawful detainer of real property held by Petitioner pursuant to a month to month tenancy after franchise termination, where Petitioner received notice in writing that such tenancy was terminated more than one month before Texaco filed its action?

LIST OF PARTIES

All parties to the proceeding in the court whose judgment Petitioner seeks to review appear on the caption set forth on the cover of this brief. Further, in accordance with Supreme Court Rule 29.1, Texaco Refining and Marketing Inc.'s parent company is Texaco Inc., and the only manner in which a person can acquire an ownership interest in any subsidiaries of Texaco Inc. is by purchasing the publicly traded shares of Texaco Inc.

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I.

STATEMENT OF JURISDICTION

This case was removed to the United States District Court on August 7, 1987, under 28 U.S.C. Section 1446(e), based on federal question jurisdiction under 15 U.S.C. Section 2805(a) of the PMPA and based on diversity of citizenship under 28 U.S.C. Section 1332. The United States Court of Appeals had appellate jurisdiction under 28 U.S.C. Section 1291. This Court has jurisdiction to review this matter under 28 U.S.C. Section 1254.

II.

RESTATEMENT OF THE CASE

Nature of the Case

Petitioner, a service station operator, was a franchisee under a written contract for the delivery of motor fuels. Petitioner's lease provided that Petitioner would not rent trucks from the premises, but he did anyway. Texaco terminated Petitioner's franchise by written notice on March 24, 1984.

Petitioner's first amended complaint contains three causes of action against Texaco. The first cause of action alleged that the termination of Petitioner's franchise was in violation of the PMPA. Petitioner's second cause of action alleged that Texaco's refusal to continue sales of Texaco trademark products after the franchise termination was in violation of California Business and Professions Code Section 21140.4. Petitioner's third cause of action alleged that, after Texaco notified Petitioner of the franchise termination, Texaco wrongfully declined to

approve or disapprove an alleged sale by Petitioner of the franchise. Petitioner alleged that he was thus entitled to exemplary and compensatory damages, and that Texaco's breach of contract amounted to a breach of the implied covenant of good faith and fair dealing.

Also at issue is Texaco's counterclaim. The second claim of Texaco's counterclaim was for Petitioner's wrongful detention of the premises after Texaco's express termination of Petitioner's holdover tenancy.

Course of Proceedings and Disposition of Case By the Ninth Circuit

Petitioner filed his complaint on July 23, 1985, in the Superior Court of California for the County of Orange. Petitioner's first amended complaint was served on Texaco on December 23, 1985. On August 7, 1987, Texaco removed the case to the United States District Court for the Central District of California. On August 12, 1987, Texaco filed its answer to Petitioner's first amended complaint and also filed a counterclaim.

On February 12, 1988, Texaco filed a motion for summary judgment on Petitioner's first cause of action. The District Court heard the motion on March 14, 1988. On March 25, 1988, the District Court ordered that Texaco's motion for summary judgment on Petitioner's first cause of action be granted.

On May 25, 1988, Texaco filed a motion for summary judgment on Petitioner's second and third causes of action and further moved for summary judgment on the second case of action in Texaco's counterclaim for unlawful detainer. On July 27, 1988, the District Court entered

findings of fact and conclusions of law on Texaco's motion of May 25, 1988, and granted summary judgment for Texaco on Petitioner's second and third causes of action. The District Court also granted interlocutory summary judgment in favor of Texaco as to all liability issues on Texaco's counterclaim for unlawful detainer. In addition, the District Court ordered that a writ of a possession be issued forthwith restoring the premises to Texaco. The judgment narrowed the issues for trial to the amount of Texaco's damages for Petitioner's unlawful detainer of the premises.

On September 26, 1989, the matter came on regularly for trial. On August 17, 1990, Texaco filed its proposed findings of fact and conclusions of law. On August 21, 1990, the District Court entered its decision awarding Texaco the sum of $68,322.14 and costs of the action.

Petitioner filed his Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on September 2, 1990. Counsel for both parties argued and submitted the matter on March 6, 1992. The Court of Appeals affirmed the ruling of the District Court in all respects on March 20, 1992. The panel voted unanimously to deny appellant's petition for rehearing on May 11, 1992.

Restatement of Facts

In January, 1983, Texaco leased the premises that is the subject of the case at bar to Petitioner. Also in January, 1983, Texaco entered into an Agreement of Sale that provided for the sale by Texaco of its trademark brand motor fuels to Petitioner for delivery at the premises.

On March 12, 1984, Texaco gave Petitioner written notice that his retailer franchise was terminated. The letter set forth June 12, 1984, as the effective date for termination. After Texaco gave Petitioner the termination notice, Petitioner sent a letter dated March 21, 1984, wherein Petitioner requested Texaco's position with respect to Petitioner's alleged desire to sell his franchise.

Texaco made no motor fuel sales to Petitioner after June 12, 1984. Moreover, Petitioner admitted below that he had no agreement with Texaco authorizing or permitting him to use Texaco's trademark in connection with the sale of motor fuels after June 12, 1984.

Following termination of the franchise on June 12, 1984, Petitioner occupied the premises on a month to month tenancy. On July 24, 1984, Texaco sent Petitioner a notice of termination of the month to month tenancy effective August 31, 1984. Despite the cancellation of Petitioner's month to month tenancy, Petitioner refused to vacate the premises and remained until June 30, 1988. Asserting, among other things, that Texaco's termination of Petitioner's franchise violated the PMPA, Petitioner filed this action on July 23, 1985, in the Orange County Superior Court.

III.

SUMMARY OF RESPONDENT'S ARGUMENT

Texaco did not address below and will not discuss here Petitioner's argument concerning the propriety of the franchise termination of June 12, 1984. Although Texaco believes that the termination was entirely proper

under the PMPA, Petitioner's failure to challenge the termination within one year renders any discussion of Petitioner's U-Haul operations irrelevant. Furthermore, we note that Petitioner's statement of facts is based upon, in several instances, proposed opposition findings of fact filed by his attorney in connection with his opposition to summary judgment motions. We ask that this Court treat such paper, which is not evidence and which was rejected by the District Court and the Ninth Circuit, as wholly insufficient to establish any material issue of triable fact. Specifically, paragraphs two through sixteen in Petitioner's statement of facts on appeal to the Ninth Circuit and pages four through five in Petitioner's statement of facts in his petition for certiorari rely in whole and occasionally in part on C.R. 16 and on C.R. 31, both of which were Petitioner's responses to Texaco's proposed statements of fact and conclusions of law and were signed only by Petitioner's attorney.

The relevant inquiry in this case begins with Texaco's letter to Petitioner dated March 12, 1984. On that day, Texaco told Petitioner that, pursuant to the PMPA, Texaco was terminating Petitioner's franchise effective June 12, 1984.

Petitioner responded, after the notice, by requesting through his attorney that Texaco advise Petitioner as to Texaco's opinion regarding any possible sale of the franchise by Petitioner. Texaco did not and was not required to respond to the inquiry because Petitioner made the inquiry *after* the notice of termination. The Ninth Circuit has stated, and Petitioner cannot reveal any conflicting holdings in the circuits, that a franchisee may not avoid the consequences of his conduct that led to the notice of

termination by simply assigning or selling his interest in the premises after such notification. Accordingly, since the PMPA preempts all state law not the "same as" the PMPA, Petitioner cannot seek a state remedy for Texaco's failure to respond to the inquiry when the PMPA bars any remedy whatsoever.

As of June 12, 1984, Texaco halted its delivery of motor fuels to the premises occupied by Petitioner. Texaco thereafter had neither agreement nor obligation to sell Texaco branded motor fuel to Petitioner after June 12, 1984, the effective date of Petitioner's termination. Hence, as of June 12, 1984, Petitioner no longer had a franchise agreement with Texaco.

Although the franchise relationship between Texaco and Petitioner was over, Texaco received rent money from Petitioner in July, 1984, and thus created a month to month lease for the land pursuant to paragraphs eight and eleven of the lease and the letter from Texaco dated July 24, 1984, that acknowledged the holdover tenancy. No agreements existed between Texaco and Petitioner, however, regarding the sale of Texaco motor fuel to Petitioner after June 12, 1984.

The month to month tenancy was terminated by Texaco as of August 31, 1984, pursuant to a lease termination letter from the Texaco real estate department (the notice of termination dated March 14, 1984, of Petitioner's franchise was handled by Texaco's marketing department). Petitioner refused to leave the premises pursuant to Texaco's notice and thus his detention of the premises became wrongful as of September 1, 1984.

On July 23, 1985, Petitioner filed a civil action in the Superior Court of California to challenge Texaco's termination of his franchise. Petitioner thus filed his action more than one year *after* June 12, 1984. Petitioner's challenge to the termination is thus barred by the PMPA's one-year statute of limitations.

Petitioner finally left the premises on June 30, 1988. After trial in the district court, Texaco was awarded damages based on evidence of the fair market rental value of the premises for the period of the unlawful detainer by Petitioner less the month to month partial payments by Petitioner during the same period.

IV.

ARGUMENT

A. Removal of Petitioner's Action to The District Court Is Proper Where All of The Claims Arise Under the PMPA, Which Provides Expressly That The District Courts Have Original Jurisdiction Over PMPA Actions, Petitioner Did Not Move to Remand, and Petitioner Did Not Present the Issue to the Ninth Circuit.

Petitioner cannot challenge Texaco's removal of this action to the district court because any case wherein the federal district courts have original jurisdiction may be removed to the district court of the United States. 28 U.S.C. § 1441(a). The district courts of the United States have original jurisdiction over PMPA actions. 15 U.S.C. § 2805(a). Hence, complete preemption by the PMPA is not the issue before this Court because the district court

had subject matter jurisdiction and original jurisdiction and thus may hear the case.

Petitioner never challenged the removal by moving to remand. Indeed, Petitioner complains of the removal for the first time in his petition for certiorari. Because Petitioner never moved to remand the action, he has waived any challenge to the removal. *See Medlin v. Boeing Vertol Co.*, 620 F.2d 957, 960 (3d Cir. 1980) (after unchallenged removal and case heard on merits, the court cannot remand for procedural irregularity, but can remand if subject matter jurisdiction absent).

In the case at bar, the district court had subject matter jurisdiction conferred expressly by the PMPA, Texaco removed the state court action filed by Petitioner, Petitioner did not move to remand the action to the state court, and after extensive litigation, judgment was entered. Petitioner now complains that he would like to try again in state court. Petitioner offers no reason, either in law or in equity, why this Court should hear such a petition.

B. The Statute of Limitations Bars Petitioner's First Cause Of Action For Wrongful Termination Under The PMPA Because More Than One Year Elapsed Between The Termination Date And The Date Petitioner Filed Suit.

1. The statute of limitations began to run on June 12, 1984, when Petitioner's franchise was terminated.

The one-year statute of limitations in the PMPA starts running on the date a petroleum franchise agreement is

terminated. 15 U.S.C. § 2805(a)(1). On these facts, the clock started running on June 12, 1984, for on that date Petitioner's franchise was terminated as set forth in Texaco's notice of termination to Petitioner of March 12, 1984. As of June 12, 1984, Petitioner himself knew that his franchise was terminated because Texaco would not sell him motor fuels after that date.

Petitioner attempts to avoid the clear bar of the one-year limitations period by asserting that his holdover tenancy is a franchise under the PMPA. Petitioner's argument must be rejected because Petitioner's month to month lease after June 12, 1984, was not a franchise under the PMPA.

To show a franchise under the PMPA, a Petitioner must prove an express agreement whereby a refiner (Texaco) authorizes a retailer (Petitioner) to use the refiner's trademark in connection with the sale of motor fuels. 15 U.S.C. § 2801(1)(A). *Pride v. Exxon*, 911 F.2d 251, 254 (9th Cir. 1990) (sales do not create a PMPA franchise when the sales are not of trademark "branded" motor fuels). On June 12, 1984, Petitioner's supply of motor fuels from Texaco ceased and the agreement with Texaco was terminated.

Petitioner's attempt to imply that a holdover lease of land resuscitates a deed franchise is wholly without support. In short, Petitioner fails to recognize that a lease for land is not the same as a sales agreement that authorizes the use of a trademark to sell motor fuels. Petitioner cannot imply from the holdover land lease a new creature called a holdover franchise, for a franchise agreement to use a trademark in the sale of motor fuels cannot be

implied. *Iannuzzi v. Exxon Co., U.S.A., Div. of Exxon*, 572 F. Supp. 716, 723-25 (D. N.J. 1983).

In *Iannuzzi*, an Exxon franchisee, Mr. Iannuzzi, entered into a sales agreement with Exxon in 1976. Mrs. Iannuzzi, however, did not sign the sales agreement. In 1978, the PMPA was enacted and applied retroactively. Mr. Iannuzzi died in 1980. Mrs. Iannuzzi continued to receive motor fuel deliveries from Exxon. Exxon asserted that the continued deliveries were not due to the sales agreement, but rather that they were due to federal Department of Energy allocation requirements. In 1981, the President exempted motor fuels from the allocation requirements. Shortly thereafter, Exxon notified Mrs. Iannuzzi that Exxon would terminate the franchise effective two weeks after the notice. Exxon asserted that the termination was due to the death of the person with whom Exxon had made the contract – Mr. Iannuzzi. Mrs. Iannuzzi thereupon argued that Exxon's delivery of motor fuels after her husband's death was a course of conduct creating an implied franchise relationship between Exxon and her.

The Court rejected Mrs. Iannuzzi's argument. The Court held that "[T]he PMPA clearly and unambiguously provides that contracts be either written or oral; it does not include 'implied contracts.' " 572 F. Supp. at 724.

Similarly, Petitioner in the instant case cannot imply a PMPA franchise merely because he occupied the premises under a month to month ground lease. In *Iannuzzi*, the plaintiff was actually receiving motor fuels from Exxon. The Court nonetheless found that a franchise could not be implied.

On our facts, not only did Texaco give notice that Petitioner's franchise was terminated effective June 12, 1984, Texaco also refused to sell one drop of motor fuel to Petitioner after June 12, 1984. In the case at bar, there were simply no sales between Texaco and Petitioner after the effective date of termination. Thus, there is less of a basis to "imply" a PMPA franchise than suggested in the facts at issue in *Iannuzzi*. Moreover, Texaco's letter acknowledging the holdover tenancy to Petitioner stated expressly that the holdover tenancy did not extend the sales agreement that had been terminated by Texaco's notice of termination.

Even if Petitioner purchased Texaco trademark motor fuel from some party other than Texaco after June 12, 1984, his agreement with Texaco itself was terminated. One must focus on the agreement to which Petitioner and Texaco are the parties because that is the agreement to which Texaco's notice of termination addressed itself. Petitioner challenged Texaco's termination of the sales agreement he had with Texaco, which agreement was a franchise under 15 U.S.C. § 2801(1)(A)(ii). Any other agreement is irrelevant whether it creates a franchise with some other party or not.

2. Petitioner's complaint was filed on July 23, 1985 – more than one year after termination of Petitioner's franchise.

Petitioner's Complaint was filed on July 23, 1985. In a PMPA action, the dealer must carry the burden of showing the existence of a franchise. 15 U.S.C. § 2805(b)(2)(A)(i). To deem Petitioner's action timely,

therefore, Petitioner has the burden of proving a franchise relationship through July 23, 1984. Petitioner failed completely to meet his burden of showing the existence of a franchise and thus Petitioner could not meet his burden as set forth under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Under *Celotex*, when a defendant properly asserts that a plaintiff has no evidence to create a genuine issue of material fact, and plaintiff fails to produce competent evidence at a summary judgment hearing to create a genuine issue of material fact, then the District Court must grant the defendant's motion for summary judgment. 477 U.S. at 323.

In this case, Texaco properly raised the issue of whether Petitioner had a franchise with Texaco under the PMPA more than one year before Petitioner filed this action. Petitioner thus had the burden to produce evidence showing that through July 23, 1984, Petitioner had an express agreement *with Texaco* authorizing Petitioner to use Texaco trademarks in the sale of motor fuels pursuant to the definitions of a PMPA "franchise" under 15 U.S.C. § 2801(1)(A). Without such an agreement, Petitioner had no franchise with Texaco within one year of filing his complaint and his action was thus not timely. The date of filing suit on the termination and the effective date of the franchise termination are clear and are more than one year apart. The District Court thus correctly concluded that Petitioner's First Cause of Action was time-barred under the PMPA.

C. The PMPA Preempts Petitioner's Second Cause of Action Because The State Remedy Asserted Therein Is Not The Same As The PMPA.

1. The PMPA preempts state law remedies for franchise termination that are not the same as the remedies provided under the PMPA.

The PMPA preempts state law remedies for franchise termination that are not the same as the remedies under the PMPA. 15 U.S.C. § 2806(a). Section 2806(a) provides in relevant part:

> 2806 (a) To the extent that any provision of this subchapter applies to the termination . . . of any franchise . . . , no State or any political subdivision may adopt, enforce, or continue in effect any law or regulation (including any remedy or any penalty applicable to any violation thereof) with respect to termination of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

This Ninth Circuit has clearly held that "[t]he language in section 2806(a) makes clear the PMPA *was intended to preempt all state law* with respect to termination of a petroleum franchise." *In re Herbert*, 806 F.2d 889, 892 (9th Cir. 1986) (emphasis in original). No conflict is present in the Circuit Courts of Appeal on this issue.

To dodge the explicit preemption mandate of the PMPA concerning termination, Petitioner argues that his second cause of action for failure to deliver motor fuels is "separate and distinct from the issue of termination of the franchise" (Petition for Certiorari, p. 16). Such reasoning would render the preemption language of the PMPA

nugatory and thus cannot stand. Whenever an agreement to sell motor fuels is terminated there is a concomitant termination of the sales themselves. Petitioner's attempt to construe the termination of the franchise as a severable issue from that which necessarily attends the termination is merely a refusal to acknowledge the obvious in the hopes that the logically apparent will go unnoticed. *See Continental Enterprises v. Am. Oil Co.*, 808 F.2d 24, 27 (8th Cir. 1986) (state law claim for breach of contract for non-renewal of service station lease against oil company barred by PMPA statute of limitations because PMPA preempts a state law action when the action arises out of the franchise or is an incident of the termination).

Altogether, Petitioner's second cause of action is a claim for damages resulting from the termination of a petroleum franchise and is therefore within the PMPA. Petitioner's ostrich-like denial of the PMPA's application to the second cause of action is without merit.

2. Petitioner's state remedy asserted in the second cause of action is not the same as the PMPA.

As discussed above, Petitioner seeks damages because Texaco refused to sell motor fuels to him after the termination date of June 12, 1984. The second cause of action is in substance a claim for damages flowing from the franchise termination.

Under these circumstances, to allow Petitioner to proceed on a state claim for damages for non-delivery of gasoline after the franchise termination date would permit a remedy for the franchise termination when, under

the PMPA, remedies are barred. Thus, the state remedy (some remedy) would not be the same as the PMPA (no remedy) and is preempted, for it is well established that if Congress puts a limit upon the time for enforcing a right that it created, there is an end of the matter. The Congressional statute of limitations is definitive. *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946).

D. The Trial Court Properly Dismissed Petitioner's Third Cause Of Action Because That Cause Of Action, For Texaco's Decision Not To Agree To The Franchise Sale, Is Preempted By The PMPA.

The PMPA preempts a claim against the franchisor for failure to agree to a franchise assignment where the assignment is requested after the sending of a termination notice by the franchisor (in this action, Texaco). *See Humboldt Oil Co., Inc. v. Exxon Co., U.S.A.*, 823 F.2d 373, 375 (9th Cir. 1987), *cert. denied* by *Mastelotto v. Exxon Co. U.S.A.*, 485 U.S. 1021 (1988). In *Humboldt*, Exxon terminated a dealer for selling mislabeled fuel. The dealer then wanted to assign his franchise to a third person, but Exxon refused to consent to that transfer. In the lawsuit over the termination, the dealer included a claim under California law based on Exxon's refusal to allow the assignment. The jury awarded the dealer a verdict for $750,000 on the state law refusal to allow the assignment claim.

The Ninth Circuit relied on the legislative history of the PMPA in reversing the award on preemption

grounds. The court noted that while the PMPA left the subject of franchise assignment to state regulation,

> " . . . the legislative history indicates that Congress anticipated potential conflict between federal termination and state assignment provisions and suggested a method of reconciliation:
>
> > 'For example, it is not intended that a franchisee may avoid the consequences of his own conduct which gave arise to a Notice of Termination or Non-renewal by merely assigning his franchise after having been notified by the franchisor of the franchisor's intent to terminate or fail to renew. Such a result would not be countenanced under general principals of equity.' [S. Rep. No. 731, 95th Cong., 2d Sess. 19, *Reprinted in* 1978 U.S. Code Cong. & Admin. News 873, 901.] To the extent that the applications of state law frustrate federal objectives, they are preempted." 823 F.2d at 375.

Thus, allowing a state law remedy for not permitting a franchise assignment would frustrate the franchisor's right to end the relationship with the dealer. A state law remedy against the franchisor for not consenting to a franchise assignment after a Franchise Termination Notice has been sent.

> " . . . clearly is an obstacle to accomplishment of Congress' undisputed interest in a national, uniform policy for petroleum franchise termination. Therefore, we conclude that in this situation the PMPA preempts California law." 823 F.2d at 375.

Petitioner has not revealed that the above holding is in conflict with other Circuit Courts of Appeal.

E. Texaco's Motion For Summary Judgment On The Second Cause Of Action Of Texaco's Counterclaim Was Properly Granted Because Petitioner Was On A Month To Month Tenancy That Was Terminated In A Timely Manner By Texaco.

Petitioner admitted in paragraph fourteen of his Answer to Texaco's counterclaim that he occupied the premises after the June 12, 1984, termination date. As such, the tenancy is presumed to be a month to month tenancy. *Cal. Civ. Code* § 1943. Accordingly, Petitioner's Tenancy was terminable on thirty days written notice. *Cal. Civ. Code* § 1946.

Shortly after June 12, 1984, Texaco sent Petitioner a letter that canceled the month to month tenancy at the premises effective August 31, 1984. Under these circumstances, Petitioner's continued occupancy of the premises after August 31, 1984, was unlawful commencing September 1, 1988. *Cal. Civ. Proc. Code* § 1161.

In response to the above contentions, Petitioner asserts that the Courts below committed error because their rulings flowed from "an implied finding" that Texaco validly terminated Petitioner's franchise. (Petition for Certiorari, p. 17). Again, Petitioner fails to acknowledge that the dispositive issue here, as it was below, focuses on the statute of limitations. Specifically, the focus is that Petitioner failed to file his PMPA action until more than one year after the effective date of termination, and an integral part of that termination was the termination of the marketing premises under the franchise.

V.

CONCLUSION

Petitioner failed to bring this action to challenge the termination of his franchise within the one-year PMPA statute of limitations. Also, Petitioner's attempt to avoid the PMPA statute of limitations by pleading state law causes of action fails. The state law causes of action are preempted because they relate to the termination of a petroleum franchise and are not the same as the PMPA. Thus, Petitioner presents nothing to warrant a grant of certiorari, and the Court should thus deny the petition.

DATED: August 28, 1992

Respectfully submitted,

TIMM A. MILLER
Counsel of Record
Attorneys for Respondent
TIMM A. MILLER,
STEVEN E. KNOTT

10 Universal City Plaza
13th Floor
Universal City, California 91608
Telephone: (818) 505-3033